CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. 535

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

PETITION FOR CERTIORARI FILED DECEMBER 5, 19[illegible]

CERTIORARI GRANTED JANUARY 4, 19[illegible]

(37,[illegible])

(37,235)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 538

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, PETITIONER,

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 19, 1933

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IN UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Customs Appeal No. 3441

Port of Chicago

Protests 235023-G-75281, 266238-G-75804, 266239-G-75825, 301714-G-76471

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Plaintiff,

vs.

THE UNITED STATES, Defendant

(Decided March 30, 1931)

PETITION FOR REVIEW—Filed April 20, 1931

To the United States Court of Customs and Patent Appeals, Washington, D. C.:

Application is hereby made, in the above entitled matter, to the honorable United States Court of Customs and Patent Appeals, for a review of the decision of the United States Customs Court in the above entitled matter, made on the thirtieth day of March, 1931, and filed by said United States Customs Court, Third Division thereof, on said day under the above described title, the Calendar and Protest numbers being 235023-G-75281, 266238-G-75804, 266239-G-75825, and 301714-G-76471. Such application is made because of errors of law and of fact committed by the said United States Customs Court, and complained of by the plaintiff therein, and applicant herein, the Board of Trustees of the University of Illinois, a copy of the errors of fact and of law complained of is in duplicate attached hereto and made a part hereof.

[fol. 2] A copy of the attached specifications or statement of errors of law and of fact was served on the Collector at the Port of Chicago, and on Charles D. Lawrence, Assistant Attorney General of the United States, in charge of cus-

toms, by mailing a copy in a sealed envelope correctly addressed with sufficient postage thereon, to the Collector at the Port of Chicago, at Chicago Illinois, and to the said Charles D. Lawrence in an envelope correctly addressed to him at 201 Varick Street, New York, New York, with sufficient postage thereon, on the eighteenth day of March, 1931. The undersigned counsel for the plaintiff made the service aforesaid himself and personally dropped the envelope aforesaid thus properly addressed and duly stamped into the United States post office at Champaign, State of Illinois, on the date and day last above mentioned.

Dated this eighteenth day of April 1931.

Board of Trustees of the University of Illinois, by H. S. Cunningham, Secretary. Sveinbjorn Johnson, Attorney for Plaintiff. (Seal University of Illinois, Chartered 1867.)

In U. S. Customs Court, Third Division

Port of Chicago

Protests 235023-G-75281, 266238-G-75804, 266239-G-75825, 301714-G-76471

[Title Omitted]

Assignment of Errors—Filed April 20, 1931

A. Errors of Fact:

1. The Court erred in finding as a fact that the University was organized under a "Special Law."

[fol. 3] 2. The Court erred in finding as a fact that the University is not an instrumentality of the State of Illinois of a strictly governmental character.

3. The Court erred in finding as a fact that the University is not a governmental character.

4. The Court erred in finding as a fact that the imposition, collection and payment of the tariff tax or duty against which the protests are made, would not destroy or embar-

rass the University of Illinois; and that the University can "get along without importing" the equipment against which the tariff tax was imposed.

B. Errors of Law:

1. The Court erred in concluding as a matter of law that the University of Illinois is not a public agency of the State of Illinois of a strictly governmental character and therefore entitled to exemption from the payment of duties upon the articles imported.

2. The Court erred in concluding as a matter of law that the activity, when carried on by the State and at public expense, of conducting a school offering work of college grade is of a purely proprietary character and that the State of Illinois, in conducting a University through the instrumentality of a public corporation created for that purpose is not engaged in performing a strictly governmental function.

3. The Court erred in concluding as a matter of law that the imposition, collection and payment of the tariff tax or duty against which the protests are made, would not destroy or embarrass the University of Illinois; and that the University can "get along without importing" the equipment against which the tariff tax was imposed.

4. The Court erred in concluding as a matter of law that the plaintiff was not entitled to exemption upon the payment of the duties protested upon any of the following grounds:

a. Because the machinery in question is the property of the State of Illinois and, therefore, the Federal Government has no right to impose an import duty upon the same.

[fol. 4] b. Because the import duty or tax is illegally and wrongfully assessed, and embarrasses the State of Illinois in performing a governmental function.

c. Because the equipment in question is the property of the State of Illinois and necessary to carry on its educational and governmental functions and operations.

d. Because the equipment is to be used at the University of Illinois, which is an agency of the State and supported by State taxes, and the imposition of an import duty or tax

against the University is equivalent to the imposition of an import duty or tax against the State and is illegal and wrongful, and in violation of the Constitution of the United States.

Respectfully submitted.

Sveinbjorn Johnson, Attorney for the Plaintiff and Appellant.

[File endorsement omitted.]

IN COURT OF CUSTOMS AND PATENT APPEALS

Protests 235023-G/75281, 266238-G/75804, 266239-G/75825, 301714-G/76471

[Title omitted]

STIPULATION AS TO PRINTING CERTAIN EXHIBITS—Filed Aug. 24, 1931

It is stipulated and agreed by and between the parties to the above entitled matter and their respective counsel that no part of Exhibits 2, 3, 4 and 5 in Protest 193436-G need be printed as a part of the record on appeal except the portions which appear on Exhibit A hereto attached and made a part of this stipulation. It is agreed that Exhibit 2, aforesaid is [fol. 5] the Bulletin of the University of Illinois, otherwise known as the Annual Register for the Year 1925-1926, containing descriptions of courses, names of the educational staff, names and addresses of students, and the like; that Exhibit 3 above refered to is the Report of the Comptroller of the University of Illinois to the Board of Trustees for the year ending June 30, 1926, exhibiting the financial condition of the University, showing receipts and disbursements; that Exhibit 4 above referred to is the Report of the Auditor of Public Accounts of the State of Illinois for the Year 1926, being the Biennial Report for the biennium beginning July 1, 1924, and ending June 30, 1926, duly transmitted to the Governor of the State of Illinois as required by law and containing, among other things, a statement of all property, real and personal, owned by the State of Illinois; that Exhibit 5 is the Fifth State Budget of the State of Illinois for the year 1927, listing among other things the requests for appropriations from the public

offices and public departments of the State of Illinois, including the University of Illinois, on page 267 thereof.

It is further agreed that the statutes creating the University of Illinois, locating the same, reorganizing it, and changing its name, shall be printed as a part of the record, all of which are attached hereto and marked for identification as a part of this stipulation as Exhibit B.

It is further stipulated and agreed by and between the parties herein that the within stipulation is subject nevertheless to all objections made by Government counsel of the trial of the instant case as to said exhibits, and that the Government does not waive any objection or objections made to any of said exhibits or the testimony relative thereto, and reserves in full all its rights respecting said objections to exhibits and testimony relating thereto.

Dated this 8 day of June, 1931.

Charles D. Lawrence, Assistant Attorney General of the United States. Sveinbjorn Johnson, Attorney for the Importer and Legal Counsel for the University of Illinois.

[File endorsement omitted.]

[fol. 6] EXHIBIT A TO STIPULATION

Protests 235023-G/75281, 266238-G/75804, 266239-G/75825, 301714-G/76471

Customs Appeal No. 3441

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Appellant,

vs.

THE UNITED STATES, Appellee

From Exhibit 2, Protest 193426-G. University of Illinois Bulletin, Annual Register, 1925-1926 (at Page 41).

"History

"The University was incorporated by an act of the General Assembly, February 28, 1867, as the Illinois Industrial University. This action was taken following the act of Congress known as the 'Morrill Land Grant,' whereby the national government gave each state in the Union public

land scrip equal to 30,000 acres for each senator and representative in Congress, 'for the endowment, support, and maintenance of at least one college whose leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts. * * * in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life.'

"The institution was placed under the control of a Board of Trustees, consisting of the Governor, the Superintendent of Public Instruction, and the President of the State Board of Agriculture, members ex officio, and twenty-eight citizens appointed by the Governor. The chief executive officer was called the Regent, and was made ex officio a member of the Board and presiding officer of both the Board of Trustees and the faculty. In 1873 the number of members was reduced to eleven—the Governor and the President of the State Board of Agriculture, ex officio, and nine others, who were still appointed by the Governor. [fol. 7] Since this time also, the President of the Board has been chosen by the members from among their own number for a term of one year. In 1887, a law was passed making membership in the Board elective at a general State election and restoring the Superintendent of Public Instruction as a member ex officio. There were then, therefore, three ex officio and nine elective members. In 1917, the General Assembly passed a law reorganizing the administration of the State. By virtue of this law, on January 1, 1919, the office of the President of the State Board of Agriculture was abolished. There are now, therefore, eleven members, two ex officio and nine elective.

"In 1885, the General Assembly changed the name of the institution from the Illinois Industrial University to the University of Illinois."

From Exhibit 2, Protest 193436-G (at Page 81)

"Beneficiary Aid

"(For more detailed information apply to the Dean of Men.)

"The following loan funds have been established for the benefit of worthy students who are in need of financial aid in order to finish their courses in the University.

"Edward Snyder Department of Students' Aid; Class of 1895 Fund; Graduate Club Loan Fund; Woman's League Loan Fund; William B. McKinley Loan Fund; Henry Strong Loan Fund; Margaret Lange James Loan Fund; Woman's Pharmacy Loan Fund (available for men as well as women); Library School Fund (administered by the Library School Alumni Association); First Fund for Overseas Soldiers; Dora E. Biddle Loan Fund; James R. Morris Loan Fund; Grace Darling Memorial Loan Fund; Student Loan Fund (Anonymous); Carter-Pennell Trust; Henry Roberts Temple Loan Fund."

(At Page 103)

"McKinley Professorship in the Economics of Public Utilities

"The Honorable William B. McKinley, United States Senator from Illinois, has endowed a professorship in the [fol. 8] Economics of Public Utilities (including transportation), in the College of Commerce and Business Administration."

From Exhibit 3, Protest 193436-G. University of Illinois, Report of the Comptroller for the Year Ending June 30, 1926 (Page 13)

"Budget Income, 1925–26

From State Appropriations for Operation:		
Salaries and Wages	$3,050,000.00	
Travel	40,000.00	
Equipment	290,000.00	
Office Expense	140,000.00	
Operation	460,000.00	
Repairs	150,000.00	
Improvements	120,000.00	
Sub-total		$4,250,000.00
For Buildings (1):		
Architecture Building	4,202.81	
Armory Addition	15,911.32	
New Gymnasium Addition	130,839.76	
New Library Addition	145,307.15	
Pharmacy Building Addition	25,629.99	
Sub-total		321,891.03
For Special Purposes:		
Cook County Experiment Station (2)		10,898.05
Total State appropriations		$4,582,789.08"

EXHIBIT 3, PROTEST 193436-G

Report of the Comptroller June 30, 1926

Transactions of Trust and Special Funds

Summary

Class of funds	Permanent		
	Amount of principal July 1, 1925	Net addition or deduction	Amount of principal June 30, 1926
Educational Endowments	$110,000.00	.....	$110,000.00
Student Loan Endowments	94,314.06	$29,561.97	123,876.03
Scholarship, Fellowship and Prize Endowments	64,691.48	1,531.72	66,223.20
Special Endowments	56,550.00	27,000.00	83,550.00
Building and Improvement Funds	.....	.....	.....
Research Donations	.....	.....	.....
Scholarship, Fellowship and Prize Donations	.....	.....	.....
Other Expendable Funds	.....	.....	.....
Deposit Funds	.....	.....	.....
Total	(325,555.54)	(58,093.69)	(383,649.23)
University Organizations' Funds (2)	.....	.....	.....
Grand Total	$325,555.54	$58,093.69	$383,649.23

(1) For Detailed Investments, see pages 52–55.
(2) Handled for accommodation.

[fol. 10]

Transactions of Trust and Special Funds

Detailed

Educational Endowments:			
W. B. McKinley Public Utility Economics Fund	$100,000.00	.....	$100,000.00
Adolph Gehrmann Lectureship in Medicine	10,000.00	.....	10,000.00
Total, Educational Endowments	(110,000.00)	.....	(110,000.00)
Student Loan Endowments:			
Anonymous Students' Loan Fund:			
Principal (Not Loanable)	30,000.00	.....	30,000.00
Income (Loanable)	4,116.88	$2,307.02	6,423.90
Carter-Pennell Loan Fund	509.13	275.16	784.29
Class of 1895 Students' Loan Fund	228.78	5.33	234.11
Darling Memorial Loan Fund	109.51	3.23	112.74
Dora E. Biddle Loan Fund	2,431.87	108.52	2,540.39
Graduate Students' Loan Fund	128.10	3.39	131.49
Margaret Lange James Students' Loan Fund	5,690.20	150.00	5,840.20
Marcus Russell Student Loan Endowment (Not Loanable)	.....	25,000.00	25,000.00
W. B. McKinley Students' Loan Fund	21,584.29	1,043.01	22,627.30
James R. Morris Students' Loan Fund	11,177.98	561.72	11,739.70
Overseas Loan Fund	2,021.54	23.58	2,045.12
[fol. 11]			
School of Pharmacy Loan Fund for Women Students	615.34	31.39	646.73
Edward Snyder Department of Students' Aid	12,636.25	.....	12,636.25

Funds	Permanent		
	Amount of principal July 1, 1925	Net addition or deduction	Amount of principal June 30, 1926
Henry Roberts Temple Loan Fund	1,023.59	43.47	1,067.06
Woman's League Students' Loan Fund	2,040.60	6.15	2,046.75
Total, Student Loan Endowments	(94,314.06)	(29,561.97)	(123,876.03)
Scholarship, Fellowship and Prize Endowments:			
Ira O. Baker Prize Fund	2,300.00	.....	2,300.00
Thrift Committee Economics Prize Fund	1,255.99	.72	1,256.71
Emily W. L. Schofield M. E. Missionary Scholarship in the College of Medicine	.....	.....	.....
English Poetry Prize Fund	641.00	.....	641.00
Francis J. Plym Fellowships and Prizes in Architecture	38,651.69	.....	38,651.69
John M. and Louisa C. Gregory Scholarship Fund	6,175.80	1,531.00	7,706.80
Robert F. Carr Fellowship in Chemistry	10,000.00	.....	10,000.00
Robert Laughlin Rea Scholarships in the College of Medicine	4,800.00	.....	4,800.00
William Jennings Bryan Prize Fund for Students' Essays on Government	255.00	.....	255.00
Thatcher Howland Guild Memorial Prize Fund for Students' Poems and One-act Plays	612.00	.....	612.00
Total, Scholarship, Fellowship and Prize Endowments	(64,691.48)	(1,531.72)	(66,223.20)

From Ex. 3—Protest 193436-G

[fol. 12] From Exhibit 4, Protest 193436-G. Biennial Report of the Auditor of Public Accounts of the State of Illinois

For the Biennium Beginning July 1, 1924 and Ending June 30, 1926

"Statement No. 38 (Page 202)

"Statement of the inventory of State property compiled from reports furnished to the Auditor of Public Accounts by the various offices, departments and institutions, for the years 1924 and 1925

* * * * * * *

(At Page 212)

"University of Illinois

	1924	1925
Lands and lots	$1,173,025.18	$1,294,434.45
Improvements—Buildings	7,606,101.52	10,961,439.09
Improvements—Other than buildings	311,265.53	470,572.56
Personal property	3,963,234.70	4,387,871.13
	$13,053,626.93	$17,114,317.23
Grand total	$73,120,694.94	$81,653,094.19"

From Exhibit 5, Protest 193436-G. Illinois Fifth State Budget, 1927 (Page 3)

"Letter of Transmittal

"To the members of the Fifty-fifth General Assembly:

* * * * * * *

"As required by law, I am transmitting in this Budget the estimates of receipts and expenditures received by the Director of Finance from the elective officers in the executive and judicial departments and from the University of Illinois.

"Respectfully submitted.

"Len. Small" (Governor).

[fol. 13] From Exhibit 5, Protest 193436-G. Illinois Fifth State Budget, 1927 (Page 267)

"University of Illinois

Description	Appropriation for biennium beginning July 1, 1925	Expenditures year beginning July 1, 1925	Estimates as approved		Memo
			Year beginning July 1, 1927	Year beginning July 1, 1928	
Salaries and Wages	$6,100,000	$3,050,000	$3,275,000	$3,275,000	.....
Office Expenses	280,000	140,000	140,000	140,000	.....
Travel	80,000	38,092	40,000	40,000	.....
Operation	920,000	427,043	465,000	465,000	.....
Repairs	300,000	148,818	160,000	160,000	.....
Equipment	580,000	290,000	290,000	290,000	.....
Permanent Improvements other than new buildings	240,000	120,000	130,000	130,000	.....
New buildings	2,000,000	321,891	750,000	750,000	.....
Temporary Kitchen—Chicago (at Research and Educational Hospital)	5,000	3,662	.....	.....	.....
Agricultural Experiment Station (Cook County)	30,000	.....	.....	.....	.....
Subtotal	$10,535,000	$4,539,506	$5,250,000	$5,250,000	.....
Interest on Endowment Fund	65,000	32,450	32,500	32,500	.....
Appropriation of receipts from U. S. Morrill and Nelson Acts	100,000	50,000	50,000	50,000	.....
Total	$10,700,000	$4,621,956	$5,332,500	$5,332,500	.....

[fols. 14-30]

Revenue

	Receipts year beginning July 1				
	1924 actual	1925 actual	1926 estimated	1927 estimated	1928 estimated*
From U. S. Government Aid to Colleges (all other cash receipts of the University go directly to the University Treasurer)	$50,000	$50,000	$50,000	$50,000	$50,000

"NOTE.—The above appropriations are payable from the special University of Illinois Fund provided by a special annual property tax of 623 cents per $100 assessed value of taxable property. This raises approximately 2½ millions per annum. The balance of the appropriations is met from the General Revenue Fund."

[fol. 31] IN UNITED STATES CUSTOMS COURT

Appeal 3441

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINIOS, Appellant,

v.

THE UNITED STATES, Appellee

AMENDED RETURN TO COURT OF CUSTOMS AND PATENT APPEALS.

The petitioner above named, having applied to the United States Court of Customs and Patent Appeals for a review of the questions of law and fact involved in a decision of the United States Customs Court in the above case, and the said Court having ordered this Court to transmit to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the United States Customs Court does hereby transmit to said Court of Customs and Patent Appeals the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specifically comprises the following:

A copy of—

1. The protests enumerated in the petition, with the reports of the collector of customs.

2. The testimony taken before the Court.

[fol. 32] 3. Exhibits 1 to 5, referred to in the testimony.

4. The record in 193436-G, referred to in the testimony.

5. Exhibit 2, referred to in the testimony.

6. Motion to amend protest.

7. Stipulation of counsel.

8. The decision in question, T. D. 44758, and judgment order.

The entry papers and the Exhibits in 193436-G will be forwarded later.

Witness the Honorable Presiding Judge of the United States Customs Court, this 16th day of June, A. D. 1931.

J. W. Dale, Clerk. (Seal.)

Constitutional exemptions—Scientific apparatus.

PROTEST 235023-G/75281

May 2, 1927.

Collector of Customs, Port of Chicago, Chicago, Illinois.

SIR: We respectfully protest against the liquidation and assessment of duty on the merchandise covered by the entry hereinafter noted, assessing duty thereon at the rate of 65% ad valorem, aggregating $51.35. The merchandise consists of chemical glass-ware. The merchandise was imported from Munchen, Germany, on the S. S. President Harding, arriving on March 28, 1927, Bremen, entered under consumption entry No. 18140 IT-62041 and liquidated June 14, 1927. Such merchandise was imported by the University of Illinois to be used exclusively in the chemical laboratory for educational and instructional purposes only by such University as an educational agency of the State of Illinois.

[fol. 33] We claim that such merchandise should come in without duty, as being imported by an instrumentality of the government of the State of Illinois, for use in the execution of a governmental function and purpose, under the well-established policy of the Federal Government not to tax the States or their agencies and subdivisions. We more especially particularize the grounds of protest as follows:

"1. Said tax is illegal and wrongfully assessed.

"2. The Federal Government has no authority to impose such duty upon imports made by the State of Illinois.

"3. Such goods are necessary instrumentalities to carry on the governmental operation of the State of Illinois.

"4. The University exercises governmental functions and needs the merchandise heretofore described in the execution of such functions and intends to use the same for such purpose.

"5. The assessment is paid to prevent seizure of the property of the University of Illinois."

The Board of Trustees of the University of Illinois in Behalf of the University and the State of Illinois, by H. S. Cunningham, Secretary. Sveinbjorn Johnson, Attorney for the University of Illinois.

Received Jun. 28, 1927, Collector's Office, Custom House, Chicago, Ill.

Indorsed: Port of Chicago. Protest No. 75281 of University of Illinois, against the assessment of duty upon chemical glassware. C Entry 18140. Dated: Apr. 8, 1927. Steamer: Pres. Harding. Liquidated Jun. 14, 1927. Protest filed: June 28, 1927; Jul. 14, 1927. Respectfully referred to the Appraiser for special report. Anthony Czarnecki, Collector. Disallowed: Jul. 20, 1927. I. C. Crafts, Assistant Collector of Customs. 235023-G.

[fol. 34] REPORT OF THE COLLECTOR

United States Customs Service

District No. 39; Port: Chicago

August 19, 1927.

United States Customs Court, 641 Washington Street, New York, N. Y.:

I transmit herewith for decision—

Date of entry	Date of liquidation	Importer or protestant	Protest No.	Date protest filed
Apr. 8, 1927	June 14, 1927	University of Illinois	75281	June 28, 1927

The following statement relative to the rate imposed or assessment complained of is submitted:

Description of Merchandise and Assessment

The merchandise consists of chemical glassware assessed for duty at 65% ad valorem under Par. 218, Act of 1922.

Reasons and Authority for Action

The entries, invoices, and official special reports covered by the protests are herewith inclosed.

Reference is made to Abstracts 50335 and 50485.

The requirements of Section 514, Part 3, Tariff Act of 1922, were complied with.

Respectfully, Anthony Czarnecki, Collector.

NOTE.—In transmitting protests, the requirements of Articles 775 and 779, Customs Regulations of 1923, should be strictly complied with.

Received Aug. 22, 1927, U. S. Customs Court. J. W. Dale, Clerk.

[fol. 35] PROTEST 266238-G/75804

Urbana, Illinois, January 6, 1928.

Collector of Customs, Port of Chicago, Chicago, Illinois.

SIR: We respectfully protest against your liquidation and assessment of duty on the merchandise covered by the entry hereinafter noted, assessing duty thereon at the rate of 30% ad valorem and aggregating $149.70. The merchandise consists of scientific apparatus imported from London by the University of Illinois on the S. S. Antonia on July 14, 1927, entered under consumption entry No. 3532 and liquidated December 16, 1927, at the port of Chicago, I. T. No. CM 23. Such merchandise was imported by the University of Illinois for use in the department of electrical engineering, and exclusively in the work of the University as an educational agency of the State of Illinois.

We claim that such merchandise should come in without duty, as being imported by an instrumentality of the government of the State of Illinois, for use in the execution of a governmental function and purpose, under the well-established policy of the Federal Government not to tax the States or their agencies and subdivisions. We more especially particularize the grounds of protest as follows:

"1. Said tax is illegal and wrongfully assessed.

"2. The Federal Government has no authority to impose such duty upon imports made by the State of Illinois.

"3. Such goods are necessary instrumentalities to carry on the governmental operations of the State of Illinois.

"4. The University exercises governmental functions and needs the merchandise heretofore described in the execution of such functions and intends to use the same for such purpose.

[fol. 36] "5. The assessment is paid to prevent seizure of the property of the University of Illinois."

The Board of Trustees of the University of Illinois in behalf of the University and the State of Illinois and of itself, by H. S. Cunningham, Secretary. Sveinbjorn Johnson, Attorney for the University of Illinois.

Received Jan. 10, 1928, Collector's Office, Custom House, Chicago, Ill.

Indorsed: Port of Chicago. Protest No. 75804 of University of Illinois against the assessment of duty upon scientific apparatus. C Entry 3532. Dated: Aug. 26, 1927. Steamer: Antonia. Liquidated: Dec. 16, 1927. Protest filed Jan. 10, 1928; Jan. 11, 1928. Respectfully referred to the Appraiser for special report. Anthony Czarnecki, Collector. Disallowed: Jan. 14, 1928. J. W. Mahoney, Deputy Collector of Customs. 266238-G. Received Feb. 17, 1928, U. S. Customs Court, J. W. Dale, Clerk.

REPORT OF THE COLLECTOR

United States Customs Service

District No. 39; Port: Chicago

February 15, 1928.

United States Customs Court, 641 Washington Street, New York, N. Y.:

I transmit herewith for decision—

Date of entry	Date of liquidation	Importer or protestant	Protest No.	Date protest filed
Aug. 26, 1927	Dec. 16, 1927	University of Illinois	75804	Jan. 10, 1928

[fol. 37] The following statement relative to the rate imposed or assessment complained of is submitted:

Description of Merchandise and Assessment

The merchandise consists of an electrical machine and parts, assessed for duty at 30% ad valorem under Par. 372, Act of 1922.

Reasons and Authority for Action

The entries, invoices, and official special reports covered by the protests are herewith enclosed.

The requirements of Section 514, Part 3, Tariff Act of 1922, were complied with.

Respectfully, Anthony Czarnecki, Collector.

NOTE.—In transmitting protests, the requirements of Articles 775 and 779, Customs Regulations of 1923, should be strictly complied with.

Received Feb. 17, 1928, U. S. Customs Court. J. W. Dale, Clerk.

PROTEST 266239-G/75825

May 21, 1927; Jan. 17, 1928.

Collector of Customs, Port of Chicago, Chicago, Illinois.

SIR: We respectfully protest against your liquidation and assessment of duty on the merchandise covered by the entry hereinafter noted, assessing duty thereon at the rate of 45% ad valorem and aggregating $747.90. The merchandise consists of scientific instrument and parts imported in one case from England on the S. S. Minnewaska, leaving England on April 23, 1927, and arriving on May 3, 1927, entered under consumption entry No. X 2703 at the Port of New York and IT No. 69406, and liquidated at [fol. 38] the Port of Chicago, Jan. 16, 1928. Such merchandise was imported by the University of Illinois for use in one of the departments thereof exclusively for educational and instructional purposes as an educational agency of the State of Illinois.

We claim that such merchandise should come in without duty, as being imported by an instrumentality of the government of the State of Illinois, for use in the execution of a governmental function and purpose, under the well-established policy of the Federal Government not to tax the States or their agencies and subdivisions. We more especially particularize the grounds of protest as follows:

"1. Said tax is illegal and wrongfully assessed.

"2. The Federal Government has no authority to impose such duty upon imports made by the State of Illinois.

"3. Such goods are necessary instrumentalities to carry on the Governmental operations of the State of Illinois.

"4. The University exercises Governmental functions and needs the merchandise heretofore described in the execution of such functions and intends to use the same for such purpose.

"5. The assessment is paid to prevent seizure of the property of the University of Illinois."

The Board of Trustees of the University of Illinois in behalf of the University and the State of Illinois, by H. S. Cunningham, Secretary. Sveinbjorn Johnson, Attorney for the University of Illinois.

Received Jan. 18, 1928, Collector's Office, Custom House, Chicago. Ill.

Indorsed: Port of Chicago. Protest No. 75825 of University of Illinois against the assessment of duty upon scientific instruments. C entry 21168. Dated: Jun. 2, 1927. Steamer: Minnewaska. Liquidated: Jan. 16, 1928. Protest filed Jan. 18, 1928; Jan. 26, 1928. Respectfully referred [fol. 39] to the Appraiser for special report. Anthony Czarnecki, Collector. 266239-G. Disallowed: Feb. 7, 1928. J. W. Mahoney, Deputy Collector of Customs. Hensel, Bruckmann & Lorbacher, Inc. Received Feb. 17, 1928, U. S. Customs Court. J. W. Dale, Clerk.

REPORT OF THE COLLECTOR

United States Customs Service

District No. 39; Port: Chicago

February 15, 1928.

United States Customs Court, 641 Washington Street, New York, N. Y.:

I transmit herewith for decision—

Date of entry	Date of liquidation	Importer or protestant	Protest No.	Date protest filed
June 2, 1927	Jan. 16, 1928	University of Illinois	75825	Jan. 18, 1928

The following statement relative to the rate imposed or assessment complained of is submitted:

Description of Merchandise and Assessment

The merchandise consists of an optical instrument assessed for duty at 45% ad valorem under Par. 228, Act of 1922.

Reasons and Authority for Action

The entries, invoices, and official special reports covered by the protests are herewith inclosed.

The requirements of Section 514, Part 3, Tariff Act of 1922, were complied with.

Respectfully, Anthony Czarnecki, Collector.

[fol. 40] NOTE.—In transmitting protests, the requirements of Articles 775 and 779, Customs Regulations of 1923, should be strictly complied with.

Received Feb. 17, 1928, U. S. Customs Court. J. W. Dale, Clerk.

PROTEST 301714-G/76471

Urbana, Illinois, May 18, 1928.

Collector of Customs, Port of Chicago, Chicago, Illinois.

SIR: We respectfully protest against your liquidation and assessment of duty on the merchandise covered by the

entry hereinafter noted, assessing duty thereon at the rate of 40% amounting to $654.80, upon a valuation of $1,637. The merchandise consists of scientific instruments in two cases, imported from Rotterdam on the Du S. S. Nieu Amsterdam on April 16, 1928, entered under consumption entry No. 18558 I. T. No. 63336, and liquidated by you at the Port of Chicago, May 7, 1928. The merchandise aforesaid was imported for the University of Illinois for use in one of its departments, exclusively in the work of the University as an educational agency of the State of Illinois.

We claim that such merchandise should come in without duty, as being imported by an instrumentality of the government of the State of Illinois, for use in the execution of a governmental function and purpose, under the well-established policy of the Federal Government not to tax the States or their agencies and subdivisions. We more especially particularize the grounds of protest as follows:

"1. Said tax is illegal and wrongfully assessed.

"2. The Federal Government has no authority to impose such duty upon imports made by the State of Illinois.

"3. Such goods are necessary instrumentalities to carry on the Governmental operation in the State of Illinois.

"4. The University exercises Governmental functions and needs the merchandise heretofore described in the exe- [fol. 41] cution of such functions and intends to use the same for such purpose.

"5. The assessment is paid to prevent seizure of the property of the University of Illinois."

The Board of Trustees of the University of Illinois in behalf of the University and the State of Illinois, by H. S. Cunningham, Secretary. Sveinbjorn Johnson, Attorney for the University of Illinois.

Received May 24, 1928, Collector's Office, Custom House, Chicago, Ill.

Indorsed: Port of Chicago: Protest No. 76471 of The Board of Trustees of the University of Illinois against the assessment of duty upon Federal Government assessing duty on imports of State University. C. Entry 18558,

4/23/28. Steamer: Nieu Amsterdam. Liquidated: May 7, 1928. Protest filed May 24, 1928; Jun. 1, 1928; Jul. 7, 1928. Respectfully referred to the Appraiser for special report. Anthony Czarnecki, Collector. Disallowed: Aug. 2, 1928. J. W. Mahoney, Deputy Collector of Customs. 301714-G. Received Aug. 8, 1928, U. S. Customs Court. J. W. Dale, Clerk.

REPORT OF THE COLLECTOR

United States Customs Service

District No. 39; Port: Chicago

August 7, 1928.

Board of U. S. General Appraisers, 641 Washington Street, New York, N. Y.:

I transmit herewith for decision—

Date of entry	Date of liquidation	Importer or protestant	Protest No.	Date protest filed
Apr. 23, 1928	May 7, 1928	The Board of Trustees of the University of Illinois	76471	May 24, 1928

[fol. 42] The following statement relative to the rate imposed or assessment complained of is submitted:

Description of Merchandise and Assessment

The merchandise consists of scientific apparatus and parts assessed for duty at 40% ad valorem under Par. 360, Act of 1922.

Reasons and Authority for Action

Reference is made to Abstract 50335.

The entries, invoices, and official special reports covered by the protests are herewith inclosed.

The requirements of Section 514, Part 3, Tariff Act of 1922, were complied with.

Respectfully, Anthony Czarnecki, Collector.

NOTE.—In transmitting protests, the requirements of Articles 775 and 779, Customs Regulations of 1923, should be strictly complied with.

Received Aug. 8, 1928, U. S. Customs Court. J. W. Dale, Clerk.

IN UNITED STATES CUSTOMS COURT

Protests Nos. 235023-G, 266238-G, 266239-G, 301714-G

UNIVERSITY OF ILLINOIS, Plaintiff,

vs.

THE UNITED STATES, Defendant

Before Associate Justice Tilson

Statement of Evidence

Chicago, Illinois, June 25, 1929.

APPEARANCES

Sveinbjorn Johnson, Esq., attorney for the plaintiff.

Charles D. Lawrence, Esq., Assistant Attorney General, [fol. 43] for the defendant, By James R. Ryan, Esq., special attorney, of counsel.

COLLOQUY

Mr. Johnson: Sometime in 1927 the University of Illinois protested the collection of import duty on scientific instruments. In due time testimony was offered and the case was submitted to this Court. On October 29, 1928, the Court, one division of the Court, decided against the importer. Counsel for the importer took steps to appeal to the United States Court of Customs Appeals but, upon further consideration decided to put the evidence in in another case with a view to filling in certain gaps in the testimony which were disclosed by the decision of the Court on October 29, 1928. So, the purpose of this hearing and our purpose here is pursuant to a stipulation entered into with the Government at the December Term in 1928. First, we stipulate or call to the attention of the Court that the record and the exhibits in that other case (which is Calendar No. 193436-G, and the decision of which is reported in T. D. 43023) may be considered a part of the record in these cases for the purposes of decision, and now wish to offer some brief additional evidence.

At the December Term in 1928 we stipulated that the record in the case which I have identified and which was decided by this Court be made a part of the record in all

of the cases that were on the calendar then and that were "Ready" yesterday. In order to facilitate the consideration of them and to save time we continued all but four and, therefore, all the testimony offered here today will be in the following four cases: 266239-G, 301714-G, 266238-G, 235023-G. All of these were on the calendar and all the others on the calendar were continued and the testimony which will be offered will have reference to all of these four cases. The witness whom I shall call will, unless otherwise indicated, offer testimony which will be equally appropriate in support of our contentions in all of the cases unless there is objection to that course.

I desire in Case No. 266239-G to move to amend the protest in a rather unimportant matter.

[fol. 44] Mr. Ryan: No objection to the amendment.

Justice Tilson: Motion granted.

Mr. Johnson: May it be understood that the protest as amended will be re-written as amended and filed with the case. May it also be understood Mr. Counsel for the Government that the testimony and exhibits in the case to which I referred is incorporated and will be considered a part of the record in this case.

Mr. Ryan: No objection. All exhibits that were in the record are incorporated.

Mr. Johnson: It will also be understood that the protest in each of these cases will be regarded as a part of the record, a part of the evidence.

Mr. Ryan: I object to it being a part of the evidence. They are in the nature of pleadings. The four cases should be consolidated and tried together and the evidence applied to each one.

Mr. Johnson: All right. I will call Mr. Edwards.

H. M. Edwards, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Johnson:

Q. You heard the statement made with reference to these four cases?

A. I did.

Q. Are you familiar with the purchases which are involved in these importations?

A. I am.

Q. Mr. Edwards, I call your attention to Consumption Entry X-2703 and Exhibit No. 1 as marked for identification and ask you if you have seen that before?

A. I have.

Q. Will you tell the Court what it is?

A. This is a photostatic copy of a State warrant issued by the State Auditor.

Q. Do you know in consideration of what Exhibit No. 1 was issued?

A. This warrant was payable to the Collector of Customs in the amount of $664.80 which is in payment of duty on scientific instruments imported by the University of Illinois.

Mr. Johnson: We offer Exhibit No. 1 in evidence.

Mr. Ryan: That is evidence of the payment of duty on one of the importations.

[fol. 45] Mr. Johnson: In this particular case.

Mr. Ryan: No objection.

By Mr. Ryan:

Q. That is a photostatic copy of a cancelled check now on file in the auditor's office at Springfield?

A. Yes, sir.

Justice Tilson: Mark it Exhibit No. 1.

(Photostat referred to received in evidence and marked Exhibit No. 1, Protest No. 235023-G, &c., Chicago, Illinois, June 25, 1829.)

By Mr. Johnson:

Q. I will ask Mr. Edwards if the payment of the duty as evidenced by Exhibit No. 1 in this case was made in the usual and customary mode in such cases?

A. It was.

Q. I call your attention in case No. 301714-G to the importer's Exhibits No. 2 and No. 3 as marked for identification and ask you if you can tell us what they are?

A. This is a photostatic copy of a warrant issued by the auditor of the State of Illinois. The payee is J. E. Bernard Company, Inc., who acted as importing agent for the

University of Illinois, $654.80 of which was payment of duty on scientific instruments imported from Europe on Customs Entry No. 18558.

Q. As to Exhibit No. 2 can you tell us what that is?

A. That is a receipt for $654.80 issued by the Customs House, Chicago.

Mr. Johnson: We offer in evidence Importer's Exhibits No. 2 and No. 3.

Mr. Ryan: No objection.

Justice Tilson: Mark them.

Q. Mr. Edwards, in case No. 266238-G I call your attention to Plaintiff's Exhibit No. 4 for identification and ask you to tell us what it is.

A. This is a State auditor's warrant drawn in favor of the Davison Freight Forwarding Company in the amount of $283.74.

[fol. 46] Q. For what was that issued?

A. $224.55 of this amount was to cover duty on measuring apparatus imported by the University of Illinois on Consumption Entry 3532. The balance of the amount goes to make up incidental expenses in importing such as freight, entry, insurance and so on.

Q. Mr. Edwards, will you kindly examine the exhibits which you hold in your hand and tell us whether there is correction to be made in the duty?

A. The original duty assessed on this shipment was 45 per cent. It was later changed to thirty per cent and a refund was made to the University in the amount of $74.85.

Q. Was the correct amount of duty made to the collector?

A. $149.70.

Mr. Johnson: The importer offers in evidence Exhibit No. 4.

Mr. Ryan: No objection.

Justice Tilson: Mark it.

(Document referred to received in evidence and marked Exhibit No. 4, Protest 235023-G, &c., Chicago, Illinois, June 25, 1929.)

Q. In Calendar No. 235023-G I show you Plaintiff's Exhibit No. 5 for identification and ask you to explain what that is?

A. This is a warrant issued by the State auditor in favor of the American Express Company for $79.70, $51.35 of which is in payment of duty on chemical glassware imported by the University of Illinois. The balance of the amount is for incidental expenses connected with importation.

Mr. Johnson: I offer in evidence Plaintiff's Exhibit No. 5.

Mr. Ryan: No objection.

Justice Tilson: Mark it.

(Document referred to received in evidence and marked Exhibit No. 5, Protest 235023-G, &c., Chicago, Illinois, June 25, 1929.)

Q. Mr. Edwards, with reference to Exhibits Nos. 1, 3, 4, and 5, I ask you if the checks or drafts of which these ex-
[fol. 47] hibits are the photostatic copies were drawn upon funds appropriated by the Legislature of Illinois to the University of Illinois?

Mr. Ryan: I object unless there is something to show that this witness knows upon what ones they were drawn.

Q. Are you familiar in your capacity as purchasing agent with the sources of income, the revenue of the University of Illinois?

A. I am.

Q. And from which items are paid through your department?

A. Yes.

Mr. Johnson: Now, Mr. Reporter, please read my original question.

Question read as follows:

Q. "Mr. Edwards, with reference to Exhibits Nos. 1, 3, 4 and 5, I ask you if the checks or drafts of which these exhibits are the photostatic copies were drawn upon funds appropriated by the Legislature of Illinois to the University of Illinois?"

The Witness: They were.

Q. I take it from your statement that the payments of duty on these cases were made in the usual and ordinary course of business and in the usual and ordinary manner?

A. They were.

Q. How long have you been purchasing agent?

A. Twelve years.

Q. Is there any policy in your Department or pursued by the University with respect to the purchase of equipment and supplies in the domestic market or in the foreign market?

Mr. Ryan: I respectfully object.

Mr. Johnson: If I may explain, the reason for asking the question is this: The contention was made by the Government in the other case to which I have referred that the duty really had a double or dual aspect, that of a tax to protect industry. My purpose in asking this question is to show that this University is paying a tax and that it pur-[fol. 48] chases abroad only when it cannot find the scientific equipment in the domestic market.

Mr. Ryan: I ask to have Judge Johnson's remarks stricken from the record.

Justice Tilson: I will allow him to prove it.

The Witness: It is the policy of the University to import when articles that are required cannot be obtained in this country.

Justice Tilson: Say what the University does.

Q. Is that the practice?

A. That is the present practice of the University.

Q. Has it been the practice since you have been purchasing agent?

A. It has, in the main, for the twelve years.

Mr. Ryan: No questions.

Horace B. Ingalls, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Mr. Ryan: The Government will admit that the student fees do not in any substantial degree support the University of the State of Illinois, but, in so conceding this fact, we contend, while admitting that the legislature makes appropriations for the University, that it is a private educa-

tional corporation and not a part of the sovereign State of Illinois.

Direct examination.

By Mr. Johnson:

Q. Mr. Ingalls, is the University supported to any extent by gate receipts, for example, collections for admission to football games?

Mr. Ryan: I object to that question as calling for a conclusion as to what is substantial.

Justice Tilson: Strike it out.

Q. Mr. Ingalls, is there any money that finds its way into the money available for the purchases of supplies which comes from the proceeds of collections from athletic games?

A. There is none.

[fol. 49] Q. Do you know the sources of income?

A. I do.

Q. Are you familiar with the sources from which the revenue came with which the University operated the first two years of its existence? A. Yes.

Q. Will you please tell the Court from what source?

Mr. Ryan: It was opened in 1854.

Mr. Johnson: It was opened in 1867.

Mr. Ryan: We will admit it is a Land Grant College.

Q. Read it into the record.

A. The report of the Treasurer at a meeting of the Board of Trustees, the Second Annual Meeting.

Q. As found in the Annual Report of the Trustees?

A. At page 106.

"Cr.

"By $40,000 from Champaign County Bonds	$40,000.00
By Interest on $125,000 Illinois Bonds	3,750.00
By Rent on Farm	500.00
	$45,250.00"

Q. With reference to the items which have been read into the record from the first report of the Board of Trustees—

Mr. Ryan (interrupting): Whom is it made to?
Mr. Johnson: To the Governor.

Q. I ask you if you know what is meant by the item in the receipts "Interest on Illinois Bonds"?

Mr. Ryan: I object as being immaterial.
Mr. Johnson: That is all.
Mr. Ryan: No questions.

[fols. 50-50e] ELLERY B. PAINE, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Johnson:

Q. In Case No. 266238-G I call your attention to an importation of scientific apparatus and ask you if you recall or know of that purchase?
A. I do.
Q. Was it made on your order?
A. Yes.
Q. On your requisition?
A. Yes.
Q. Before you ordered that purchase from abroad will you tell us what if anything you did to see if you could purchase in this country?
A. We wrote the several manufacturers of electrical apparatus such as the General Electric Company, Westinghouse. They answered us that they were not prepared to make quotation on such specifications.
Q. Is that in keeping with the policy of your department with regard to the purchase of equipment?

Mr. Ryan: I object.
Justice Tilson: Overruled.
The Wtiness: It is the practice.
Mr. Ryan: I will admit if these witnesses who are now present were called they would testify substantially as the witness on the stand but object to such testimony as irrelevant, immaterial and inadmissible.

Justice Tilson: I will allow it.

Mr. Johnson: Submitted.

Mr. Ryan: Submitted.

Mr. Johnson: I request time for the filing of brief, your Honor.

Justice Tilson: I will allow thirty days after the transcription and filing of the testimony for the filing of brief by plaintiff, and thirty days thereafter for the Government.

I do certify that the foregoing transcript is a correct and true transcription of all testimony offered, heard or introduced by either party on the trial, together with all the objections made, rulings thereon, and exceptions thereto.

Edmund J. Devlin, per S. C. H.

(Submitted.)

[fols. 51-59] IN U. S. CUSTOMS COURT, FIRST DIVISION

Protest No. 193436-G

UNIVERSITY OF ILLINOIS, Plaintiff,

vs.

THE UNITED STATES, Defendant

Before Associate Justice Young

Statement of Evidence

Chicago, Ill., January 5, 1927.

APPEARANCES

Sveinbjorn Johnson, Esq., attorney for the plaintiff.

John F. Kavanagh, Esq., special attorney, for the defendant.

[fols. 60-62] LLOYD MOREY, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Johnson:

Q. Your name is Lloyd Morey?

A. Yes, sir.

Q. What is your official position?

A. Comptroller of the Board of Trustees of the University of Illinois.

Q. Are you an officer of the Board of Trustees of the University of Illinois?

A. Yes, sir.

[fol. 63] By Mr. Johnson:

Q. Mr. Morey, how long have you been with the University?

A. Since 1912.

Q. In the capacity of comptroller, most of that time?

A. Since 1916.

Q. How did you get your position?

A. I am elected annually.

Q. By whom?

A. By the Board of Trustees.

Q. How is the Board constituted?

A. It is made up of nine members who are elected by the people of the State, by popular election.

Q. Any ex-officio members?

A. Two, both elected by the people of the State.

Q. Does the University hold any property?

A. Yes, sir; the Board of Trustees holds titles to property.

Q. What is the nature of that property?

A. Both real and personal.

Q. And under whose control is the property?

A. Under the control of the Board of Trustees, acting in their capacities and according to the statutes.

Q. And beyond that it is under the control of what body?

A. The general assembly of the State of Illinois.

Q. In your capacity as comptroller do you make any reports to any State officer?

A. Yes, sir.

Q. To what officer?

A. The Governor, and auditor of public accounts.

Q. What is done with your report after it is received?

A. It becomes a part of the records of the State.

Mr. Kavanagh: That is objected to as an opinion, not properly proved.

Justice Young: What do you mean by that?

Mr. Kavanagh: Well, he says they form a part of the records of the State. How do we know that?

By Mr. Johnson:

Q. I will ask you another question. Mr. Morey, just what do you mean by that when you say they become a [fol. 64] part of the records of the State?

A. For example, I make a report to the State auditor of public accounts of the property and that report appears in the report of the auditor of public accounts that the property listed in it is reported as State property.

Q. Mr. Morey, as comptroller of the University, you have information as to the sources of income of the institution?

A. Yes, sir.

Q. Please state the primary sources of income?

A. They are from appropriations by the State of Illinois, which is the general assembly of the State of Illinois, out of State funds; by appropriations from Federal funds by the Congress of the United States, and the income from an endowment established by the Congress of the United States.

Q. Now, then, how does the Congress make these appropriations? What I mean is are the appropriations made directly to the University in all cases, or are they made to the State of Illinois and then reappropriated to the University by the Legislature?

A. Some are made to the University and some to the State, which are reappropriated.

Q. Do you have in mind any of the acts, Congressional acts, under which appropriations of the kind you have described are made?

A. I can refer to them exactly if I may refer to a copy of my files. I refer to the so-called Morrill Act of 1890.

Q. Any others?

A. To the so-called Nelson Act, of 1907.

Q. Any others?

A. To the so-called Hatch Act, of 1881.

Mr. Kavanagh: Pardon me, are those Congressional acts?

Mr. Johnson: Yes, sir; this is just for our information.

A. (Continuing:) To the so-called Adams Act of 1906, to the so-called Smith-Lever Act of 1914, to the so-called Smith-Hughes Act of 1917, to the so-called Purnell Act of 1925.

Q. Under these acts the Government, or the Congress of the United States has appropriated to the use of the [fol. 65] University of Illinois directly or indirectly substantial sums as are in the Act?

A. Yes, sir.

Q. And the funds of which you have spoken are those received from the State of Illinois and from the Government of the United States, are devoted to what uses?

A. To educational purposes.

Q. Is there any tuition required or asked in the institution?

A. No, sir; not to the extent of covering the cost of instruction.

Mr. Kavanagh: That is objected to.

Justice Young: Just tell what it is.

By Mr. Johnson:

Q. What do you mean by tuition?

A. When you asked me if there is tuition I interpret that as meaning a charge made to cover all the costs of education. We do not charge tuition. There are certain small service charges made.

Q. Called what?

A. Called incidental matriculation fees, etc.

Q. They are for special service, as I understand it, such as library fees, for use of the library, and so forth?

A. And examination fees.

Justice Young: How much do those amount to each year?

The Witness: The gross amount, do you mean?

By Mr. Johnson:

Q. Or per student?

A. An average of about $60.00 per student.

Q. Then you have stated the primary sources of the income of the University entirely?

A. Yes, sir.

Q. There are, of course, some secondary sources like those of which you have spoken, which amount as I understand merely to a turnover of appropriations made, and a turnover again into cash afterwards for services and

commodities and so on, which are incidental to the work of the University.

[fol. 66] Mr. Kavanagh: I object to the form of the question as practically telling the witness.

Mr. Johnson: I will withdraw the question. I am not interested in proving that.

Justice Young: Objection overruled.

Mr. Kavanagh: Exception.

By Mr. Johnson:

Q. You may answer. You can answer "yes" or "no."

A. Your statement is substantially correct.

Mr. Johnson: You can have an explanation of that if the Court wishes.

Justice Young: Yes.

Q. Explain in a general way just what you mean by that?

A. There are certain items of income from the sale of products resulting from the educational activities of the University.

Justice Young: As I understand it those things that are made and sold, are not primarily made for getting money out of it, but for the purpose of affording instruction to the students. That is the first purpose?

The Witness: That is the first purpose.

Justice Young: Instead of giving them away they turn them into such money as they can get out of them.

The Witness: Yes, sir.

By Mr. Johnson:

Q. That is what you meant by incidental uses?

A. No activity is carried on for the primary purpose of making money or making profit.

Q. The University is not engaged in any activity primarily for profit?

A. No, sir.

Justice Young: From the standpoint of dollars and cents it is very bad business for a State to conduct this University. It is a heavy drain on the State treasury. From a business standpoint and from the standpoint of profit, it

[fol. 67] might be better to close it up. Is that right? I am talking about dollars and cents now.

The Witness: The University is costing the State out of its tax levies and other revenues five and a quarter million dollars a year at the present time.

By Mr. Johnson:

Q. As I understand you then, to close this topic we are talking about all the money appropriated by the Legislature and by Congress, and that represents the two primary sources, the University is devoted to instructional and educational properties?

A. Yes, sir.

Mr. Kavanagh: You are not going to prove from this witness the use to which this imported merchandise was put?

Mr. Johnson: I intended to do that by another witness, but I can just as well.

Justice Young: If you have another witness it would be better.

Cross-examination.

By Mr. Kavanagh:

Mr. Kavanagh: I will cross-examine this gentleman on the facts brought out by Mr. Johnson.

X Q. How many students has the University of Illinois?

A. Approximately 12,000.

X Q. And how many of them come from the State of Illinois?

A. Approximately 10,000.

X Q. 2,000 are from other parts of the United States, and possibly from Europe?

A. Yes, sir.

X Q. Now, these 2,000 that come from the other parts of the United States and from Europe, do they receive free tuition?

A. No, sir. They pay a small tuition charge.

X Q. What is the small tuition charge?

A. 50 per cent of the incidental fees.

X Q. What would that amount to in dollars and cents?

A. $25.00 a year.

X Q. That is the only charge you make to students from outside of the State of Illinois and Europe. Of course you [fol. 68] charge for the textbooks?

A. Yes, sir. The students have to purchase their own textbooks outside.

X Q. The University derives a revenue from the sale of textbooks to students coming from outside of the State of Illinois?

A. It does not sell textbooks to students.

X Q. Haven't they a university book store?

A. Operated by private parties.

X Q. Having no connection with the university?

A. No.

X Q. The University of Illinois derives a large income from the athletic activities of the students?

A. No, sir; the University as such does not derive income from athletics.

X Q. What becomes of the proceeds of these football athletics?

A. The entire collegiate athletics are operated by a corporation organized at the Athletic Association.

X Q. Do they not in turn, turn in some or all of the money to the University?

A. No, sir; they apply it all to educational purposes, but it is handled in a separate treasury.

X Q. This stadium that was recently built out there, how much did it cost?

A. One million seven hundred thousand dollars.

X Q. Where did the money come from?

A. From private subscription, of former students, citizens and others entirely.

X Q. No part from the University of athletic association?

A. No part.

X Q. You receive quite a large amount of money, do you not, from endowments?

A. No, sir; we have a very small amount of endowments outside of the endowment made by Congress, which I have referred to.

X Q. How much do you get annually in private endowments, that is from alumni.

A. The only income is not in excess of $20,000 a year.

X Q. That is the income?

A. That is the income.

X Q. And at five per cent that would indicate that is about four million dollars?

A. Oh, no, four hundred thousand dollars.

X Q. You get $2000?

A. Yes.

X Q. And that is all your private endowment is, four hundred thousand dollars?

A. Practically. It is not that much. I have stated that rather high.

[fol. 69] X Q. Would you consider that receiving appropirations from Congress, that that would make the University of Illinois just as much a national institution as it would a State institution?

Mr. Johnson: This is objected to as calling for a legal conclusion.

Justice Young: It is cross-examination. He may answer.

A. I hesitate to answer that because I don't feel competent. The University is primarily a State institution as I understand it, a division of the Government of the State and operating under the General Assembly of the State of Illinois. The fact that it receives appropriations from Congress gives it a certain national aspect I should think.

X Q. What is the average annual appropriation from Congress to the State of Illinois for the University?

A. About $340,000 per annum.

X Q. $340,000 a year? The National Government also maintains at the University of Illinois what is commonly known as the R. O. T. C., you know, doesn't it?

A. Yes, sir.

X Q. It is necessary that all male students become members of that reserve officers' training corps?

A. It is.

XQ. And the National Government furnishes its own officers to conduct this training corps, doesn't it?

A. It does.

X Q. Are all the tangible assets of the University of Illinois located in the State of Illinois? In other words, do you own real property outside of the State of Illinois?

Justice Young: What has that to do with this issue?

Mr. Kavanagh: I am trying to establish, Your Honor, that this is not exclusively a State conducted institution. If

they maintain and have sources of revenue outside of the State, that would appear to bear out my contention.

Justice Young: Do you mean to say that the State cannot go outside of its own boundaries?

Mr. Kavanagh: Not for a minute, Your Honor.

Justice Young: Then, what relevancy is your question? [fol. 70] Mr. Kavanagh: That if they have sources of income from outside the State of Illinois, they are not purely and entirely State institutions.

Justice Young: I think that is a very unwarranted and illogical deduction.

Mr. Kavanagh: To which the Government attorney respectfully excepts.

Justice Young: The Court shall judge as to the limit of cross-examination. As to this particular matter I don't think it has any relevancy. Proceed.

Mr. Johnson: The witness had answered.

The Witness: No.

By Mr. Kavanagh:

X Q. Has it any personal property outside of the State of Illinois?

A. No.

X Q. I think you stated on direct examination what the income was from so-called athletic activities?

Justice Young: He said that the University derived no revenue from that source.

Mr. Johnson: He stated that it was a separate proposition.

Mr. Kavanagh: I wanted to have my memory refreshed by the amount of money.

By Mr. Kavanagh:

X Q. How much was it?

A. You asked me what the income is from athletics.

X Q. Yes.

A. The Athletic Association is organized separate from the University, a corporation, and has an income of about $400,000 a year.

X Q. Doesn't the University of Illinois, or members of the faculty exercise control over this so-called athletic corporation?

A. To a reasonable extent.

X Q. And what is that reasonable extent?

A. The members of the corporation are appointed by the Board of Trustees of the University.

X Q. They are not elected by this so-called athletic association?

A. No, sir.

[fol. 71] X Q. And the members of the faculty of the University of Illinois have control over the expenditures of this athletic association?

A. No, sir.

Mr. Johnson: I object to that. All right. I was going to object to this as wholly immaterial; the witness having explained that the University derived no income from that to be used in its educational work.

Justice Young: Objection overruled.

Mr. Kavanagh: I believe that this is pertinent.

Justice Young: It is a little bit nearer to it than some of the other questions.

Mr. Kavanagh: That is about all from this witness.

Redirect examination.

By Mr. Johnson:

R. Q. Mr. Morey, Mr. Kavanagh brought up something which suggested an omission on my part. State very briefly the departments maintained by the University, so that the Court may have a comprehensive view of the courses of instruction.

A. The departments are agriculture, engineering, otherwise known as mechanical arts; liberal arts, science, law, medicine, dentistry, pharmacy, music, library science and education, also military science and physical education.

R. Q. Which Mr. Kavanagh brought out?

A. Which Mr. Kavanagh brought up.

Mr. Kavanagh: The Court might be aided if the protestant would offer in evidence one of the year books of the University, that would in a concise and readable way show just the objects of the University, where it obtained its revenue.

Justice Young: It is stipulated that the witness may furnish to the Court a catalogue, which when identified will be marked and incorporated in the record.

(A copy of the University of Illinois Buletin, annual register, 1925-1926, which was subsequently forwarded to the Clerk of the U. S. Customs Court, was marked Exhibit 2, Protest 193136-G, of this date.)

[fol. 72] Mr. Johnson: I was wondering if Mr. Kavanagh had in mind the report of the comptroller or the annual report to the State Auditor.

Mr. Kavanagh: Assuming that a prospective student wants to enroll, he writes for a book and they send him that.

Justice Young: It can be filed with the record.

Mr. Kavanagh: No further questions from this gentleman.

H. M. Edwards, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Johnson:

Q. Your name is H. M. Edwards?
A. It is.
Q. What is your position?
A. Purchasing agent for the University of Illinois.
Q. In what department is your office?
A. Business office, the office of the comptroller.
Q. In the comptroller's office?
A. Yes, sir.
Q. You are familiar with the merchandise, the duty on which is protested in the present proceedings?
A. I am.
Q. Did you have anything to do with the ordering or purchasing of the merchandise?
A. I personally ordered it.
Q. Where was it purchased?
A. The instruments in question were purchased from London concerns. It consisted of tuning forks, and tuning galvanometers, which were purchased from H. Tinsley &

Company, of London, and one X-ray spectograf, which was purchased from Adam Hilger, Limited, of London.

Q. Will you explain how that was handled, briefly?

A. In order to facilitate shipments and clearance through customs, we asked these vendors to deliver the instruments to the American Express Company, whom we had asked to act as our agents. The American Express Company in turn forwarded the shipment to the University of Illinois, consigned to the University of Illinois, Physics Department, 115 Physics Building, Urbana, Illinois.

Q. And then, Mr. Edwards, who paid for this merchandise and how, and out of what funds?

A. The merchandise was paid——

[fol. 73] Mr. Kavanagh: If he knows, Your Honor. It has not been shown that he is able to tell that.

Mr. Johnson: He is the purchasing agent.

Mr. Kavanagh: He is the purchasing agent?

Mr. Johnson: Yes.

Mr. Kavanagh: I had not heard that.

A. The merchandise was paid for from funds appropriated by the State to the University.

By Mr. Johnson:

Q. Who paid the duty and out of what funds was the duty paid?

A. The duty was paid by the American Express Company, as agent for the University.

Q. And did the University reimburse the American Express Company?

A. They received a bill from the American Express Company, which bill being vouchered, was forwarded to the State Auditor, who issues a warrant covering the bill of the American Express Company, which included the duty.

Q. As far as you know, and from your experience, is that the usual course in which bills against the State are paid?

A. That is the usual method.

Q. Was there any insurance carried on this shipment?

A. I don't know.

Mr. Johnson: I think that is all, Mr. Kavanagh.

Cross-examination.

By Mr. Kavanagh:

X Q. What did you say your official position was, please?

A. Purchasing agent for the University of Illinois.

X Q. Do you have anything to do with the bookkeeping arrangements of the University?

A. That does not fall under my department.

X Q. Then how do you know from your own knowledge that the merchandise the subject of this protest was paid for out of funds appropriated by the State of Illinois?

A. I just know that from my contact with the other departments in the business office of the University.

X Q. How do you know it in this particular instance?

A. The bills, as far as the matter of purchase by the Uni- [fol. 74] versity, go through my office. My statement was that is the way in which the University equipment is paid for.

X Q. You heard the other gentleman testify as to the sources of income of the University this morning?

A. Yes, sir.

X Q. He said some money was received by appropriation from the National Government through acts of Congress, some through appropriations of the State of Illinois, and some through private endowment. Now, are three separate and distinct banking accounts kept for each of these separate sources of income?

A. I would not be able to answer that.

X Q. Then when you say that the particular budget was paid out of funds appropriated by the State of Illinois, you really don't know that?

A. I know that payment was made.

X Q. Please answer my question "yes" or "no."

Mr. Johnson: That is an unfair question, because whether it was paid out of those funds has nothing to do with bookkeeping accounts.

Mr. Kavanagh: I am not challenging his intelligence.

(The question was repeated by the reporter as follows: "Then when you say that the particular budget was paid out of funds appropriated by the State of Illinois, you really don't know that?")

A. It is paid out of funds appropriated by the State, yes. I know that to be a fact.

By Mr. Kavanagh:

X Q. How do you know that? How can you say that?

Justice Young: It is presumed, of course, that the same dollar bills that are sent up there——

Mr. Kavanagh: I am trying to find out if they maintain separate banking accounts, and he has answered that they do not. Then, how does he know that the money came out [fol. 75] of this separate and distinct appropriation?

Mr. Johnson: Pardon me. I didn't understand the witness to say that he knew that separate accounts were kept.

The Witness: I said I could not say.

Justice Young: He stated that they were paid out of State funds. How do you know that?

The Witness: Because the shipment of this kind is bought for educational purposes, and is paid for out of appropriations made by the State.

Mr. Kavanagh: I object to that. He has not shown how he knows how it was paid out of appropriations made by the State.

Justice Young: What was the stuff at Bar?

The Witness: This equipment consists of instruments used in the physics laboratory, for educational work, and for research work. I am not competent to state the exact use of these instruments, because that is scientific.

Justice Young: That has to do with what you might call a scientific course you have there?

The Witness: Yes, it is a course in physics, yes, entirely scientific.

Redirect examination.

By Mr. Johnson:

R. Q. Is it commercial?

Justice Young: It has not any special connection, those things which the University does, through its connection with the national Government?

The Witness: No, sir.

By Mr. Johnson:

R. Q. Was this apparatus to be used or imported to be used commercially, or in connection with educational work entirely?

A. It would have no commercial use in those laboratories.

By Mr. Kavanagh:

[fol. 76] R. Q. This merchandise consisted of X-ray apparatus, did it?

A. One item was what is known as an X-ray spectrograph.

R. Q. What do they use that for?

A. I am not competent to explain the exact use of the instrument, but it is used for the purpose of measuring light rays. That is my understanding of it.

R. Q. It is used in the physics laboratory?

A. In the physics laboratory.

R. Q. Do they give lectures in this physics laboratory to people other than students at the University?

A. Not that I know of.

R. Q. You would not say that they do not?

A. Not positively.

R. Q. Do they ever have lectures in which they use scientific instruments wherein they charge an admission fee?

A. In this department?

R. Q. In the University of Illinois.

A. Not to my knowledge.

R. Q. You don't know?

A. No, sir.

R. Q. What was this other merchandise besides the X-ray spectrograph?

A. That was a tuning fork.

R. Q. That is also used in the physics laboratory?

A. That is also used in the physics laboratory. That is used in——

R. Q. Recording sound?

A. Not in this way.

R. Q. Anything else besides tuning forks?

A. Two galvanometers.

R. Q. That is for measuring electric current?

A. That is for measuring electric current.

R. Q. Do they use those in lectures to which they admit others than students in the University?

A. I can't conceive of a possibility of someone being in on one of the lectures or demonstrations.

R. Q. Without being charged an admission fee?

A. Without being charged.

R. Q. What becomes of this merchandise, that is the tuning forks and the X-ray spect-ograph, and so on, when [fol. 77] the University wishes to dispose of them? Do they give them away or sell them?

A. We could do either.

R. Q. And do you do both?

Justice Young: That has not very much relevancy to this case. He may answer.

A. Do you ask if we could both sell it or give it away?

By Mr. Kavanagh:

R. Q. Yes, which do you do, or both?

Justice Young: What has that to do with the case?

Mr. Johnson: What are you asking, about the apparatus?

Mr. Kavanagh: They might derive profit out of the merchandise and sell it for more than it cost them.

Mr. Johnson: A second-hand apparatus?

Mr. Kavanagh: They might get it at a bargain.

The Witness: Sometimes we have such equipment, which is sold, sometimes we have equipment that we just have to throw away.

By Mr. Kavanagh:

R. Q. But it is possible that this merchandise could be sold if the University no longer wished to keep it?

A. If we found someone who wanted it and was willing to pay for it.

Justice Young: You didn't buy it and sell it, did you?

The Witness: Absolutely no.

Mr. Kavanagh: I guess that is all.

Mr. Johnson: I think that is all; unless you want to make some explanation in connection with this testimony; some matter that has not been covered.

The Witness: No.

[fol. 78] LLOYD MOREY, a witness called on behalf of the plaintiff, was recalled, and testified further as follows:

Direct examination.

By Mr. Johnson:

Q. Do you know in what department these instruments which were imported and which are here in controversy are to be used?

A. Yes, in the physics department.

Q. And are they to be used for any purpose other than educational?

A. No, sir.

Q. I think you said you were familiar with the charter of the University. Does the University have a charter that is framed up on the wall some place, or where is the charter?

A. It does not have a charter that is framed, but its charter consists of an Act of 1867, of the General Assembly.

[fol. 79] The Witness: Mr. Edward was unable to answer fully the question regarding funds. I might add a short explanation regarding that point.

Justice Young: I think that is pretty thoroughly covered.

The Witness: I am familiar with the handling of all of the funds of the University and the various funds are kept separately. Separate accounts are kept. The appropriations made by Congress are not available for the purchase of equipment of this kind. They are for special purposes, stated in the acts.

Justice Young: That is my recollection.

The Witness: The collections made from students are for service charges of various kinds. Funds for equipment are appropriated by the general assembly only, and that is the only source from which a purchase of this kind could be made.

By Mr. Johnson:

Q. I will ask you now whether the students' or incidental fees are available for the purchase of merchandise of this sort?

A. They are not generally available for that.

Cross-examination.

By Mr. Kavanagh:

X Q. Have you got the voucher that paid for this merchandise?

A. I don't have it here.

X Q. Would that voucher show what fund is drawn on?

A. I presume it would.

[fols. 80-84] Mr. Kavanagh: Do you wish to offer it, Mr. Johnson?

Mr. Johnson: I don't have it. I wish to ask Mr. Edwards one question.

H. M. Edwards, a witness for the plaintiff, was recalled and testified further as follows:

Redirect examination.

By Mr. Johnson:

R. Q. Was this merchandise purchased f. o. b. London?

A. Purchased f. o. b. London.

Mr. Johnson: We submit.

I do certify that the foregoing transcript is a correct and true transcription of all testimony offered, heard or introduced by either party on the trial, together with all the objections made, rulings thereon and exceptions thereto.

S. C. Hudnell.

[fol. 85] In United States Customs Court

In re Protest No. 266239-G, Collector's Protest No. 75825

[Title omitted]

Motion to Amend Protest

The above entitled Protestant moves to amend the Collector's Protest herein, No. 75825, to conform with the facts, and the first paragraph thereof, by striking from the third line thereof the figures "45%" and inserting in lieu thereof the figures "40%"; and by striking from the

same line the figures "$747.90"; and inserting in lieu thereof the figures "$664.80", and that as so amended the said protest be a part of the record herein.

Sveinbjorn Johnson, Attorney for the Protestant.

Received June 25, 1929, U. S. Customs Court, Port of Chicago. J. W. Dale, Clerk, by E. J. D. Reporter.

Denied June 25, 1929. Wm. J. Tilson, Justice

IN U. S. CUSTOMS COURT

In re Calendar Nos. 301714-G, 235023-G, 266239-G, and 266238-G

[Title omitted]

STIPULATION AS TO TESTIMONY

Whereas counsel for both parties in the above entitled matter, when the same came up for hearing before the [fol. 86] above named court at Chicago on July 26, 1929, stipulated that Professor G. L. Clarke and Dr. A. P. Carman, if called as witnesses, would testify, in substance, to the same effect, as Professor Payne who testified with reference to case No. 266238-G, supra.

Now, therefore, be it stipulated and agreed by and between the parties hereto and their counsel that the testimony of Professor G. L. Clarke, had he been called to the witness stand, would have referred to Case No. 235023-G, and that the testimony of Professor A. P. Carman, had he been called to the witness stand, would have referred to Cases Nos. 301714-G and 266239-G; that the equipment in the last two named cases consisted of a microfotometer and a quartz spectograph, respectively, whereas the equipment with reference to which Professor Clarke would have testified was Jenna glass.

It is stipulated and agreed that these witnesses, had they been called to the stand, would, in their respective cases, have testified, in substance, as did Professor Payne, to the effect that they made unavailing efforts to obtain equipment which would meet the needs of their departments in this country before requisitioning a purchase abroad, and that they would have testified that the equipment, in each and all of the cases concerning which the testimony of these two witnesses would have been given

had they been called to the stand, was not obtainable in the United States and for that reason was imported from abroad.

It is understood that this stipulation concerning the testimony of the witnesses Clarke and Carman is in all respects subject to the objection made by counsel for the Government when Dr. Payne testified, namely: that such testimony was irrelevant, incompetent and immaterial upon any issue or point involved in this lawsuit; that is to say, this stipulation is in all respects made subject to each and all objections made by counsel for the Government to the admissibility of the testimony of Dr. Payne upon the points covered in this stipulation, and such objections shall be regarded as having been interposed against the testimony of the witnesses Clarke and Carman.

It is stipulated and agreed that the Court in deciding the above entitled matter shall do so giving full legal effect [fol. 87] to this stipulation concerning this part of the record.

Dated this twenty-ninth day of July, 1929.

Sveinbjorn Johnson, Counsel for the Importer.
James R. Ryan, for Assistant Attorney General for the United States, Defendant.

Received Jul. 30, 1929, U. S. Customs Court. J. W. Dale, Clerk.

IN U. S. CUSTOMS COURT, THIRD DIVISION

(T. D. 44758)

Protests 235023-G, etc., Against the Decision of the Collector of Customs at the Port of Chicago

UNIVERSITY OF ILLINOIS

v.

UNITED STATES

(Decided March 30, 1931)

OPINION

YOUNG, Judge:

This is a suit against the United States arising at the port of Chicago brought to recover certain customs duties

alleged to have been illegally exacted upon certain scientific apparatus, the plaintiff claiming judgment against the defendant for the sum of $1,572.40. The appraiser reports the merchandise to consist of scientific articles in chief value of glass, an electrical machine and parts thereof, and an optical instrument. Duty was assessed thereon at the appropriate rates under the appropriate paragraphs of the Tariff Act of 1922.

The plaintiff bases its claims upon the following grounds:

We claim that such merchandise should come in without duty, as being imported by an instrumentality of the Government of the State of Illinois, for use in the execution [fol. 88] of a Government function and purpose, under the well-established policy of the Federal Government not to tax the states or their agencies and subdivisions. We more especially particularize the grounds of protest as follows:

1. Said tax is illegal and wrongfully assessed.

2. The Federal Government has no authority to impose such duty upon imports made by the State of Illinois.

3. Such goods are necessary instrumentalities to carry on the governmental operations of the State of Illinois.

4. The University exercises governmental functions and needs the merchandise heretofore described in the execution of such functions and intends to use the same for such purpose.

5. The assessment is paid to prevent seizure of the property of the University of Illinois.

At the trial of this case the record in the case of University of Illinois et al v. United States, T. D. 43023, was incorporated with and made a part of the record herein.

The evidence shows that the University of Illinois was organized as a corporation under a special law of the State of Illinois; that it is under the control of the State; that the members of the board of trustees are elected by the people of the State; that it is supported partly by State taxes, partly from a land grant from the United States, partly by appropriations of the National Congress, partly from service charges made against the students, and partly by benefactions; that it offers a wide variety of courses of instruction; that the institution is one for higher educa-

tion—that is, education beyond that furnished in the regular courses in the high schools; that the doors are open to students from all the States of the Union and, apparently, all the countries of the world; that students from areas outside of the State of Illinois are charged higher fees than those living within the State; that the merchandise the subject of duties herein is certain laboratory equipment consisting of scientific articles in chief value of glass, an electrical machine and parts thereof, and an optical in- [fol. 89] strument; and that the duties were paid by warrants issued by the State auditor and drawn upon funds appropriated by the State Legislature of Illinois for the University of Illinois.

The purpose of the institution is to furnish instruction, at a small part of its cost, in the liberal arts, agriculture, engineering, military science, music, medicine, dentistry, pharmacy, and business administration to students from Illinois, and elsewhere, who have completed a course in a standard high school or its equivalent.

This is a very interesting and important case, partly because it is a case of first impression, there being no direct authority on the principal point involved. The decision will therefore create a new precedent.

The attorney for the plaintiff in his very able and comprehensive brief contends that the exaction complained of is a tax; that the property upon which it is sought to be levied is property used necessarily and exclusively by the University of Illinois as an educational agency; that the University is a State agency created and maintained by the State in the exercise of a power reserved to the State, viz, that of establishing and maintaining public schools; and that education is a governmental function, so that the agencies and properties used in connection therewith are exempt from Federal taxation as instrumentalities of the State created and used to facilitate the exercise of a governmental as distinguished from a proprietary purpose. He further says:

We rest our position in the case at bar primarily on the fundamental proposition laid down in a large number of cases decided by the Federal Supreme Court from the very beginning of the Government, McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, that the United States "can not exercise its power of taxation so as to destroy the State

governments, or embarrass their lawful action * * *"; Railroad Co. v. Peniston, 18 Wall. 5, 30; and that consequently, it must be presumed that Congress did not intend to authorize customs officers to collect a duty in the circumstances of the present case, notwithstanding the language of the tariff act is without exception in favor of this class of property. See also Texas v. White, 7 Wall. 700, 725, 19 L. Ed. 227, 237.

[fol. 90] We are not insensible to the force of this argument. Assuming, but not definitely deciding, that the University is a governmental instrumentality of the State, let us consider whether merchandise imported by the University is exempt from the payment of tariff duties under the Constitution by necessary implication.

It is well settled that a duty on imports is a tax on the article, which is paid by the consumer. Brown v. Maryland, 12 Wheat. 419.

If the tax involved in the case at bar were an internal-revenue tax, the result would be entirely different. In Collector v. Day, 11 Wall. 113, the court reaffirmed the holding of Chief Justice Marshall that the power to tax involves the power to destroy. There the right of the Federal Government to levy an income tax against the salary of a State judge was in question. True, the amount of the tax, about $30 a year, was not sufficient to destroy a judge as an instrumentality of a State government, but a tax might have been made so high as to destroy. His whole salary might have been taken in such taxation.

In Collector v. Day, the court said:

> The supremacy of the General Government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, can not be maintained. The two Governments are upon an equality, and the question is whether the power "to lay and collect taxes" enables the General Government to tax the salary of a judicial officer of the State, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the States.

We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved

powers of the State, disables the General Government from levying the tax, as that depends upon the express power "to lay and collect taxes," but it shows that it is an original inherent power never parted with, and in respect to which the supremacy of that Government does not exist, and is of [fol. 91] no importance in determining the question; and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the General Government, stand upon as solid a ground and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in Dobbins v. The Commissioners of Erie from taxation by the State; for, in this respect—that is, in respect to the reserved powers—the State is as sovereign and independent as the General Government. And if the means and instrumentalities employed by that Government to carry into operation the powers granted to it are necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that Government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any Government, whose means employed in conducting its operations, if subject to the control of another and distinct Government, can exist only at the mercy of that Government. Of what avail are these means if another power may tax them at discretion?

The question is, does this principle of self-preservation in Collector v. Day, supra, apply to a tariff tax? It is undoubtedly true that the legality of a power does not depend upon the extent to which it is exercised in the particular case before the court, but upon what may be done under it.

"The constitutional validity of a law is to be tested, not by what has been done under it, but by what may, by its

[fol. 92] authority, be done." Stuart v. Palmer, 74 N. Y. 183; Gilman v. Tucker, 128 N. Y. 190.

See Chief Justice Marshall's statement to the same effect in the case of Brown v. Maryland, 12 Wheat. at page 439, wherein he said: "Questions of power do not depend on the degree to which it may be exercised."

Consequently, if this and similar tariff taxes on goods imported by a State university were raised so high as to prohibit the articles from importation, would that destroy the institution, assuming that it is a governmental instrumentality of the State? If it would, then the tariff tax is invalid. If not, then it is constitutional.

Counsel for the plaintiff contends that the power to levy such a tax is the power to prevent its use by the consumer. We admit that this is true, but if the University of Illinois were prevented entirely from making importations, would it be destroyed? We believe not. A State government cannot be destroyed by the imposition of tariff duties upon articles used for the purpose of higher education, because, even if such duties were made prohibitive, the university could get along without importing them. The existence of the States is in no way threatened by such duties. Even if the duties should be made so high as to preclude their importation, it would not result in destroying the University or seriously impairing its usefulness.

The question of interference with a State government in this case is too remote. In Railroad Co. v. Peniston, 18 Wall. 5, the Supreme Court held:

> It can not be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, coexistent with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and [fol. 93] its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise.

The constitutional implication preventing the Federal Government and the State from taxing each other's agencies must receive a practical construction permitting each Government to function with a minimum of interference with the other.

In the case of Metcalf & Eddy v. Mitchell, 269 U. S. 514, the Supreme Court had under consideration a tax levy under the following circumstances: Metcalf and Eddy, the plaintiffs, were consulting engineers professionally employed to advise the State or subdivisions of the State in reference to proposed water supply and sewage disposal systems. During the year 1927 the fees received by them for these services were paid over to the firm and became a part of its income. The question was whether such income was subject to taxation under the war revenue act of 1917. It was contended that Congress had no power under the Constitution to tax the income in question for the reason that the State immunity extends to all appropriate instrumentalities which the States may select without distinction between permanent and regular officers and employees of the States. The Supreme Court said:

> In such a situation it can not be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way. * * * we do not find that it impairs in any substantial manner the ability of plaintiffs in error to discharge their obligations to the State or the ability of a State or its subdivisions to procure the services of private individuals to aid them in their undertakings. Cf. Central Pacific Railroad v. California, 162 U. S. 91, 126. We therefore conclude that the tax in No. 183 was properly assessed.

In Willcuts v. Bunn, 282 U. S. 216, the Supreme Court held:

> Before the power of the Congress to lay the excise tax in question can be denied in the view that it imposed [fol. 94] a burden upon the States' borrowing power, it must appear that the burden is real, not imaginary; substantial, not negligible.

In a recent decision, Educational Films Corp. of America v. Ward, 282 U. S. 379, at page 391, Mr. Justice Stone, speaking for the Supreme Court, said:

> This court, in drawing the line which defines the limits of the powers and immunities of State and National Governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the same State. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without undue interference by the other.

It must be remembered that we are dealing here, not with an express constitutional restriction on power as we were in the Fox River Butter Co. case decided February 24, 1931, T. D. 44667, but only with an asserted implication.

The plaintiff failed to show that the University would be destroyed if it were prevented from importing merchandise, and, indeed, probably could not make such a showing. The University expends yearly about five millions of dollars. Of this amount probably not to exceed five thousand dollars are spent for merchandise produced in foreign countries, or one one-hundredth of 1 per cent. It surely will not be seriously contented that to close the door to such importations would destroy the institution, or noticeably impair its efficiency.

We therefore hold that the plaintiff herein, the University of Illinois, has no constitutional exemption from the payment of duties collected in the case at bar.

The defendant is entitled to judgment. Let judgment be entered accordingly.

Young, J.

[fol. 95] IN U. S. CUSTOMS COURT

CONCURRING OPINION

CLINE, Judge:

I concur in the conclusion reached by my associate in this case, but do not agree with his assumption that the University of Illinois is a governmental instrumentality. I believe a ruling on this question is necessary to a decision. In the case of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629, Mr. Chief Justice Marshall, distinguishing between public and private corporations, applied the following test:

Are the trustees and professors public officers, invested with any portion of *political* power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority? [Italics not quoted.]

The separate opinion of Mr. Justice Story, in the same case, stated:

Public corporations are generally esteemed such as exist for public *political* purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. [Italics not quoted.]

The broad rule enunciated in the Dartmouth College case, supra, distinguishing between public corporations—which are political in nature— and private corporations, was cited as controlling in the case of Trustees of Vincennes University v. Indiana, 14 How. 268, 14 L. ed. 416, wherein the majority opinion of the Supreme Court, speaking of the Vincennes University, held that—

This corporation had no political powers, and could in no legal sense be considered as officers of the State.

The opinion of the court in the Vincennes University case, supra, held further that although the benefits of a literary institution are "enjoyed by the public generally, • • •

this would not make it a public corporation."

[fol. 96] In the case of South Carolina v. United States, 199 U. S. 437, 50 L. ed 261, the Supreme Court of the United States, after quoting from numerous leading cases, said:

> These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on an ordinary private business.

In the South Carolina case, supra, the Supreme Court held that "license taxes charged by the Federal Government upon persons selling liquor are not invalidated by the fact that they are agents of the State, which has itself engaged in that business"; and in reaching this conclusion, the majority opinion made the following comments with respect to the payment of duties on merchandise imported by State agencies:

> Suppose a state assumes, under its police power, the control of all those matters subject to the internal revenue tax, and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a state of liquor, tobacco, etc., from a license tax, would exempt the importation of merchandise by a state from import duty. While the state might not prohibit importations, as it can the sale of liquor, by private individuals, yet, paying no import duty, it could undersell all individuals, and so monopolize the importation and sale of foreign goods.
>
> Obviously, if the power of the state is carried to the extent suggested, and with it is relief from all Federal taxation, the national government would be largely crippled in its revenues. Indeed, if all the states should concur in exercising their powers to the full extent, it would be almost impossible for the nation to collect any revenues. In other words, in this indirect way it would be within the competency of the states to practically destroy the efficiency of the national government.

[fol. 97] For the reasons stated herein, it is my opinion that the University of Illinois is not entitled to exemption from the payment of duties as an instrumentality of gov-

ernment; I therefore concur in the conclusion that judgment should be entered for the defendant.

Cline, J.

Importer	Protest
University of Illinois	235023-G/75281
	266238-G/75804
	266239-G/75825
	301714-G/76471

IN U. S. CUSTOMS COURT, THIRD DIVISION

Protest 235023-G, etc.

UNIVERSITY OF ILLINOIS

vs.

THE UNITED STATES

JUDGMENT

This case having duly come on for trial before the Third Division of the United States Customs Court, and the same having been heard and submitted for decision, and the Court, after due deliberation, having made and filed a decision herein, in favor of the defendant and against the plaintiff, directing that judgment be entered herein in accordance therewith; now in conformity with said decision,

It is hereby ordered, adjudged and decreed that judgment be entered for the defendant for the reasons stated in our decision herein.

Witness Hon. G. M. Young, Hon. G. R. Cline, Judges of the United States Customs Court, and the seal of said Court, at the City of New York, this 30th day of March, A. D. 1931.

J. W. Dale, Clerk U. S. Customs Court. (Seal.)

Indorsed: United States Court of Customs and Patent Appeals. Filed May 22, 1931. Arthur B. Shelton, Clerk.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Monday, February 29, 1932.

At a session of said court continued and held at the city f Washington, pursuant to adjournment, on this 29th day f February, A. D. 1932.

Present: The Honorable William J. Graham, Presiding udge, and the Honorables Oscar E. Bland, Charles S. Hatfield, Finis J. Garrett, and Irvine L. Lenroot, Associate udges.

The court was opened for business in due form.

* * * * * * *

Customs Appeal, No. 3441

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Appellant,
v.
THE UNITED STATES, Appellee

Said appeal came on to be heard before the court and fter hearing the arguments of counsel the cause was taken nder advisement by the court. Appellee granted leave to ile supplemental brief instanter.

* * * * * * *

(Signed) William J. Graham, Presiding Judge.

Jun. 20, 1932

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS, OCTOBER TERM, 1931

Customs Appeal No. 3441. Customs Cal. No. 43

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Appellant,
vs.
THE UNITED STATES, Appellee

GRAHAM, Presiding Judge:

This is an appeal from a judgment of the United States Customs Court holding certain laboratory equipment, im-

ported by appellant at the port of Chicago, to be used for educational purposes, dutiable as classified and assessed by the collector under various paragraphs of the Tariff Act of 1922.

Appellant filed protests against such classifications, claiming that the imported merchandise was free of duty "as being imported by an instrumentality of the government of the State of Illinois, for use in the execution of a governmental function and purpose". Appellant concedes that the merchandise is dutiable as classified unless it is entitled to free entry.

The lower court overruled the protests and entered judgment accordingly. From such judgment this appeal is taken.

The question presented is whether the Government has any constitutional right to impose the duties here involved.

Appellant's claim for free entry is based upon a claimed, implied exemption enjoyed by the State and National governments from taxation assessed by one against the other's essential agencies or instrumentalities, upon the theory that the University of Illinois is an agency of the State of Illinois engaged in the performance of governmental functions of that State wholly of a public character.

The Government, on the other hand, contends that the duty in question is a valid exercise of the taxing power of the Congress under clause 1, sec. 8, Article I of the Constitution of the United States, pursuant to which the Tariff Act of 1922 was enacted. Said clause reads as follows:

1. To lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

The Government contends that the maintenance of a university by a State is not a governmental function, but is proprietary, and that therefore, under the decision in the case of South Carolina v. United States, 199 U. S. 437, the duties in question were properly imposed. It also makes another contention, viz., that the importation of merchandise is a privilege, not a right, and that the Government may impose conditions upon its importation, such

as the payment of the duties here in question, under and by virtue of clause 3, sec. 8, Article I of the Constitution of the United States, which clause reads as follows:

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

Appellant, on the other hand, relies upon the case of McCulloch v. Maryland, 4 Wheat. 315, Collector v. Day, 11 Wall. 113, and many subsequent cases in support of its contention. It denies that the functions of the University of Illinois are such as to bring the property, devoted by it to educational uses, within the taxing power of the Federal Government.

The evidence produced upon the trial establishes that the University of Illinois was organized in 1867 by a general statute enacted by the Legislature of the State of Illinois. Said act denominated the institution as the "Illinois Industrial University." Its control was vested in a Board of Trustees, all of whom were appointed by the Governor. The full term of each trustee was fixed at six years, and all vacancies occurring were to be filled by appointment by the Governor and confirmed by the Senate. Broad powers were conferred upon the board to establish and conduct a higher institution of learning. Much subsequent legislation was enacted relative to the university. It is sufficient, for the purposes of this case, to say that, by act of the Legislature, the name of the institution was changed to "University of Illinois," and that, at the time of the importations here involved, its trustees were at stated times elected by the people of the State of Illinois, with the Governor and the Superintendent of Public Instruction as ex officio members of the board.

The board is given power to sue and be sued; all of the property pertaining to the university is held by the board in trust for the State of Illinois, and is carried upon the books as State property, being inventoried, in 1925, at $17,114,917.13; the institution is supported mainly by appropriations made by the legislature of said State, amounting to over $5,000,000 annually; the comptroller of the university reports regularly to the Governor and State Auditor. Equipment purchased for the use of the university is paid for by vouchers drawn by the Auditor of Public Ac-

counts of the State against State appropriations, and the duties involved in the case at bar were paid directly out of the Treasury of the State of Illinois.

The student body of the university was, at the time of the importations here in question, about 12,000 in number, approximately 10,000 of whom were residents of the State, 2,000 being resident elsewhere. No tuition is charged to students resident in the State of Illinois, but what is called a "service fee," amounting to about $60 annually, is paid by each student. Students from outside the State are charged, in addition to said service fee, a tuition fee of about $25 a year.

The Land Grant made by Congress in 1862 to the State of Illinois to aid colleges for the benefit of agriculture and mechanic arts was, by said State, turned over to said Board of Trustees, to be used for the benefit of the university, and, under various acts of Congress enacted since said year, donations have been made by the Federal Government in aid of the university. At the present time such donations amount to about $360,000 annually. The income from student fees is approximately $750,000 annually. The university also has certain endowments bestowed by private persons, amounting to about $400,000, from which an annual income of approximately $20,000 is derived.

Practically all funds received by the university are devoted to educational purposes in branches above the grade of the common school and high school.

The primary question presented here involves the power of the administrative officers of the United States, acting in alleged pursuance of authority expressed in an act of Congress, to assess and collect duties on goods imported by and for the use of a state or one of its governmental agencies. The question is one of vast importance and merits, and has received, the most careful consideration by counsel and the court.

In the organization of our constitutional system, many difficulties were experienced. The colonies, or States, had each developed as self contained and independent communities, with varying customs and laws. Zealous in the maintenance of their institutions, the States yielded, with caution, any exclusive rights of government to the general government. The constitutional government of the nation was adopted only because experience had demonstrated

that there must be such a general government that the people of the States might be secure in their persons and property. It was a union for defense and security.

Hence, the exclusive governmental powers given to the National Government were such as would provide for the "general defense and welfare" of all the people. These powers come from the people, not from the States. McCulloch v. Maryland, 4 Wheat. 315.

Whatever doubts may have been felt by any of those who framed the Constitution, and by the States in the ratification thereof, as to certain of the powers granted to the new government, there seems to have been no conflict of opinion as to granting to the Federal Government full and exclusive control of the external affairs of the nation. This included the rights to levy and collect imposts and duties on imports from foreign countries, and to regulate international commerce. The contemporaneous exposition of this subject by Hamilton is illuminating. The Federalist, Nos. XXXII, XXXIII, XXXIV, and XXXV..

This exclusive power has been recognized and vitalized by the courts. No more comprehensive discussion of the subject can be found than in McCulloch v. Maryland, supra. There Chief Justice Marshall set up certain milestones: "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action." "The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government." "The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means."

The undivided authority of the general government over imports and import duties, and foreign commerce, if, in fact, it has ever been doubted, is confirmed by many authorities. Collector v. Day, 11 Wall. 113; Fairbank v. United States, 181 U. S. 283; Willcuts v. Bunn, 282 U. S. 216. In License Cases, 5 How. 504, it was said that the controlling and supreme power over commerce with foreign nations and the several States was undoubtedly conferred upon Congress; "and here is the limit between the

sovereign power of the State and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States" (599).

The doctrine is also stated in Gibbons v. Ogden, 9 Wheat. 1; Weston v. Charleston, 2 Pet. 448; Dobbins v. Erie Co., 16 Pet. 434; Mobile v. Kimball, 102 U. S. 691, 697; Webber v. Virginia, 103 U. S. 344, 351; Van Brocklin v. Tennessee, 117 U. S. 151; Brennan v. Titusville, 153 U. S. 289, 299; Buttfield v. Stranahan, 192 U. S. 470.

These cases announce the broad principles that the State Governments not only have no right in themselves to levy and collect import duties or to regulate foreign commerce, but that they cannot interfere with, obstruct nor question the policy of, any law which Congress may, in pursuance of its constitutional functions, enact on these subjects.

The powers to lay imposts or duties and the power to regulate commerce may and often do find expression in the same act of Congress. The statutory provision may be the combined judgment of the legislative body and may embrace objects extending beyond that of revenue. It was said in Gibbons v. Ogden, supra (p-. 199, 200), that the act of laying duties or imposts on imports or exports was, very clearly, an exercise of the taxing power. Yet Chief Justice Marshall, following this expression, as clearly announced: "It is true, that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed, with a view to revenue. * * * The idea that the same measure might, according to circumstances, be arranged with different classes of power, was no novelty to the framers of our constitution. * * * The right to regulate commerce, even by the imposition of duties, was not controverted."

From the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries, "not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power of foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude

merchandise at discretion." Brolan v. United States, 236 U. S. 216.

An additional duty fixed upon goods coming from east of the Cape of Good Hope was held to be valid as a regulation of commerce. Russell v. Williams, 106 U. S. 623. In the more recent case of Hampton v. United States, 276 U. S. 394, the Supreme Court was of the opinion that a customs duty, although imposed in pursuance of an expressed policy of protection to domesticate industries, was valid and enforcible. To like effect was Arnold v. United States, 147 U. S. 494, 497. The power to regulate commerce, "like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." Gibbons v. Ogden, supra (195).

It has repeatedly been announced that the Congress may place an embargo, total or partial, upon importations from foreign countries, under the exercise of the constitutional powers to regulate commerce. United States v. Marigold, 9 How. 559; The Abby Dodge, 223 U. S. 166; Weber v. Freed, 239 U. S. 325; Hammer v. Dagenhart, 247 U. S. 251. As Congress has the right to absolutely prohibit importation, it also has plenary power to prescribe the conditions upon which the importation may be made. Sang Lung v. Jackson, 85 Fed. 502; United States v. American Exp. Co., 177 Fed. 735, 738. "Impost duties take every conceivable form, as may by the legislative authority be deemed best for the general welfare. They have been at all times often specific. They have sometimes been discriminatory, particularly when deemed necessary by reason of the tariff legislation of other countries." Knowlton v. Moore, 178 U. S. 41, 88.

We come, therefore, to this conclusion, based on reason and on the conclusive authorities cited, that it was within the constitutional power of the Congress to fix a rate of import duties to be paid when the articles imported here entered the commerce of the country. This it might do for purposes of raising revenue; it might do it as the result of a national policy of protection to the industries of the country; it might do it as a regulation of foreign commerce; for all these powers were within its exclusive power. What the purpose was, so long as it was fairly within the sphere of its constitutional functions, the appellant or the State

government, of which it claims to be a part, cannot question. Assume that the statute before us, instead of fixing a certain rate of duty, had declared a total embargo upon the importation of such articles. Could the State have ignored this embargo and imported the articles? We dare say there are none who will so contend. If, then, its importation may be prohibited, may it not, by the same power, be conditionally admitted? Upon what theory may a State contend that what the general government may do in whole, as a matter of national policy, it may not do in part?

Here, if there were otherwise question as to the purposes of Congress in enacting the statute before us, we need have no doubt. The preamble to the Tariff Act of 1922 is: "An Act to *provide revenue,* to *regulate commerce* with foreign countries, to *encourage the industries* of the United States, and for *other purposes.*" (Italics ours.)

The appellant has treated this question as if the right to import were undisputed, and the imposition of a tax was upon not only the exercise of a necessary governmental agency, but upon the exercise of a right which was absolute. But this view is fallacious. No individual has a vested right to import articles from a foreign country. His right to do this must depend upon the authority to do so conferred by act of Congress and upon the terms so fixed. Buttfield v. Stranahan, supra.

Nor, in reason, can it be seen how an agency of a State stands in any different position than an individual, in this respect. The appellant had the right to import, but its right was conditional. It will be borne in mind that the goods imported in the case at bar were foreign goods and did not become merged into the commerce of the country until the duties were levied and paid. Sonneborn Bros. v. Cureton, 262 U. S. 506, 509; Faber, Coe & Gregg v. United States, 19 C. C. P. A. (Customs) —, T. D. —. So, a tax upon the imported goods, while it remains a part of foreign commerce and is not introduced into the general mass of property in a State, differs greatly from a tax upon the property after it has been imported. License Cases, supra. (575.)

These observations seem, legitimately, to lead us to the conclusion that the duties herein were properly imposed. The appellant, however, vigorously contends that, under a well-considered line of authorities, the State of Illinois and

its various governmental agencies, are exempt from the payment of these duties. This contention rests upon two premises: First, that an impost or duty is a tax. Second, that the taxing power of the Government may not be applied to the agencies, instrumentalities and property of the State.

In support of the first premise, appellant relies upon Brown v. Maryland, 12 Wheat. 419, 439, in which the Supreme Court announced the principle: "A duty on imports is a tax on the article which is paid by the consumer."

The second premise is claimed to be sustained by a line of cases beginning with McCulloch v. Maryland, supra. In that case, in which the State of Maryland attempted to extend her taxing powers to national banks, the great chief justice announced the essential doctrine that each government, state and national, must continue to exist and perform its full functions, unimpeded and unobstructed by the other, and that neither might destroy the functions or agencies of government of the other, by taxation, or otherwise. The Supreme Court, in the case cited, did not alone refer to taxation—it referred to any means by which one government might weaken or destroy the other, in the performance of its legal or constitutional functions.

The principle thus announced has been sustained and developed by many cases: Weston v. Charleston, 2 Pet. 448; Dobbins v. Erie Co., 16 Pet. 434; United States v. Ry. Co., 17 Wall. 322; Ry. Co. v. Peniston, 18 Wall. 1, 30; Ohio v. Thomas, 173 U. S. 276; South Carolina v. United States, 199 U. S. 437; Flint v. Stone, 220 U. S. 107; Johnson v. Maryland, 254 U. S. 51; Metcalf v. Mitchell, 269 U. S. 514; Panhandle Oil Co. v. Knox, 277 U. S. 218; Indian Motocycle Co. v. United States, 283 U. S. 570.

The maintenance of our dual form of government has made necessary such a rule. Otherwise, such a system could not long exist. "But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the Federal Government must exercise its authority within the territorial limits of the States; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from

undue interference by the other." Metcalf et al. v. Mitchell, 269 U. S. 514, 523.

The same idea was expressed in Educational Films v. Ward, 282 U. S. 379, and Brown v. Houston, 114 U. S. 622, 630.

In the recent unreported case of Fox Film Corp. v. Doyal, decided May 16, 1932, Chief Justice Hughes, speaking for the court, said: "The principle of the immunity from state taxation of instrumentalities of the Federal Government, and of the corresponding immunity of State instrumentalities from Federal taxation—essential to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government (McCulloch v. Maryland, 4 Wheat. 316, 436), and the immunity does not extend 'to anything lying outside or beyond governmental functions and their exertions'."

In the later cases since Brown v. Maryland, supra, the tax involved has been such a tax or excise as was within the power of either government to impose. There were no questions of import duties, or regulation of commerce, or foreign relations, exclusive powers of the National Government, involved. One government was so functioning as to weaken or impair the other, in a field common to both, and this may not be done. If, however, in the operation of a national policy, in pursuance to a constitutional power which is exclusive, the revenues of a State are incidentally decreased, must the interests of the State not be subservient to the general welfare of all? The operation of national navigation, immigration or tariff laws may discriminate, in their effect, between communities and States, because of their diverse industries and conditions. Thus, the revenues of the State may be impaired. But does this render the laws unconstitutional? A State may desire to import articles from foreign countries. If it does so, having entered a field entirely within the control of the National Government, it must assent to and conform with every constitutional provision which the National Government has made concerning the same. For these reasons, we are of opinion that the cases heretofore referred to in this branch of the case, are not decisive of the point here involved.

To concede that the State of Illinois, or any State, might disregard and nullify, when it considers its own interests

injuriously affected, provisions of law exclusively within the control of the National Government, is to weaken and decrease the federal revenues, to nullify, to an essential degree, its power to regulate international commerce, and to set at naught any other policy which the Congress may have had in mind in enacting the legislation, affecting the welfare of all the people of the Union. In forming our national compact, the Constitution, the people of all the States freely and voluntarily consigned these governmental rights into the hands of the general government. Whatever rights the States had in this respect were then yielded up, and they cannot now assert them.

For about one hundred and fifty years of national existence, there has heretofore been no challenge of this power. The administrative officers of both States and nation have proceeded upon the theory that such duties should be paid by anyone, whether individual citizen or governmental unit, not exempted by the acts of Congress from such payment. The Congress assumed it had such power and in the tariff act of July 24, 1897, (30 Stat. 203) par. 702, when it was thought desirable to permit free entry of certain goods by a State, it so provided. Such provisions have continued in succeeding acts; including the Tariff Act of 1922, par. 1706, (42 Stat. 934). Certainly, such a long continued administrative, executive, and legislative construction of these Constitutional provisions by both States and Nation, are entitled to great weight in our determination of this matter. Hampton & Co. v. United States, supra.

While perhaps unnecessary to a decision of the case, another point may be adverted to. The activities in which the State Governments may legally engage are without number. They may conduct the business of grain elevators, banks and building associations. Green v. Frazier, 253 U. S. 233. Cities which are units of the State Government, (United States v. Railway Co., supra), may conduct fuel yards, (Jones v. Portland, 245 U. S. 217), or public utilities, Springfield G. & E. Co. v. Springfield, 257 U. S. 66. It is true that in S. Carolina v. United States, supra, it was held that the agencies of a State were exempted from a federal tax only when such agencies were performing the ordinary functions of government, and that dispensing alcoholic liquors was not such an ordinary function.

How far the courts might be called upon to go in holding importation for the various legal activities of a State to be in discharge of its ordinary functions, is uncertain. One fact, however, is obvious: The States, with their various lesser governmental units, cities, villages, counties, drainage, sanitary and reclamation districts, school boards, road districts, and the like, have myriad activities unknown to the framers of the constitution. Such functions as the building of roads and schools, the employment of convicts, the building of canals, sewers, harbors and levees, are certainly all within the exercise of the ordinary functions of the State. May concrete and stone and building material, road material, materials to employ the labor of convicts, and the like, be imported free of duty by a State, when the individual purchaser must pay the additional price due to the imposition of a duty? To so hold will lead to the result so aptly stated in South Carolina v. United States, supra:

Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.

Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government.

We are of opinion that the appellant, whether it be considered a governmental agency of the State of Illinois or not, was not exempt from the payment of the duties imposed by the collectors on the imported goods in the case at bar. This being true, a further consideration of the

governmental status of the appellant is unnecessary to a disposition of the case.

The judgment of the United States Customs Court is affirmed.

Affirmed.

Jun. 20, 1932

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS, OCTOBER TERM, 1931

Customs Appeal No. 3441. Customs Calendar No. 43

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Appellant,

v.

THE UNITED STATES, Appellee

BLAND, J., concurring:

I, like my associates, Presiding Judge Graham and Judge Hatfield, conclude that the judgment below must be affirmed, and in this result I concur. Since some of the chief reasons which bring me to this conclusion have not been sufficiently emphasized in the foregoing opinion, and in view of the importance of the case, I will state my position as briefly as possible.

Upon the record in this case two major questions are presented: First. Is it shown by this record that the University of Illinois is an agency of the State of Illinois and as such engaged in performing a governmental function when it imported laboratory equipment for use in its educational work? Second. If it is performing a governmental function, can the Federal Government constitutionally levy an import duty upon such importation?

Since this case was argued in this court, the Supreme Court of the United States in Burnet v. Coronado Oil and Gas Co., 284 U. S. —, held that the assessment by the Commissioner of Internal Revenue of income and excess profit taxes upon the net income of the lessee of public school lands of Oklahoma, which income arose from oil produced

on such lands, violated the Constitutional rights of the State of Oklahoma. A majority of the court held that when the State of Oklahoma leased her public school lands for the benefit of the public schools, she exercised a function strictly governmental in character. The decision is based upon the authority of Gillespie v. Oklahoma, 257 U. S. 501, which held that the State of Oklahoma had no right to tax income derived by a lessee of Indian land from sales of oil and gas received under the lease. While the decision in the Burnet case does not expressly state that the activity of a State in connection with all kinds of education is a governmental function, it does hold that the maintenance of public schools is the exercise of such a function.

If I were to pass upon the question as to whether or not the State's maintenance of a university was strictly the exercise of a governmental function, I might regard Burnet, supra, and other cases relied upon by appellant, as very persuasive authority in favor of the affirmative of this proposition. The facts in this record, however, are quite different from those in the Burnet case. Whether the difference in the facts of the case at bar and those of the Burnet case might properly be the basis for distinguishing this case from the Burnet case, I do not feel called upon to determine. The exact question is not whether Illinois is performing a governmental function in the maintenance of a university, but whether it is performing a governmental function when it imports foreign merchandise to be used by such university in connection with education. In view of my conclusion on the second question, it will not be necessary for me to discuss the first.

As to the second question, I am of the opinion that the Federal Government has the constitutional authority to levy import duties, such as are provided for in the Tariff Act of 1922, upon any importation imported by the State of Illinois, regardless of the use for which the merchandise is intended.

The representatives of the States in the Constitutional Convention, in order to form the character of union desired, realized that it was necessary for the States to surrender to the Federal Government certain powers which they had enjoyed. Some of such powers were surrendered absolutely, such as the control of patents, currency, naturalization,

bankruptcy, etc. Certain other powers were given the Federal Government, but not to the exclusion of the same powers being exercised by the States. In numerous instances, they vested in the Federal Government exclusive powers to do things which could not be properly done if both sovereignties operated in the same field. One of the powers given to the Federal Government was that of laying and collecting taxes, but the States did not give it the exclusive right in taxation matters. The Constitution does not say it, but it is well established that the States could not have intended to surrender their taxing powers entirely, because to do so would have been to deprive themselves of the ability to maintain government. Where the same powers are exercised by both sovereignties, controversy as to the limits of each sovereignty's power would necessarily arise.

The courts early held that the Constitution must be held to be a bar to the sovereignty of one government taxing the necessary and strictly governmental functions of the other, although no express language to that effect is found in the instrument. To hold otherwise would have left one sovereignty free to unduly burden and handicap the other in the exercise of the functions which each was to have, and lead to a result which was destructive of the purposes which the fundamental law sought to accomplish.

Prior to the ratification of the Constitution, the States, while acting independently, levied and collected import duties. By clause 3, section 8, article I of the Constitution, they surrendered to the Federal Government the right to regulate commerce with foreign nations and among the other states, and by clause 1 of the same section and article, empowered the Federal Government to lay and collect duties and imposts. As far as we are advised, it has not been contended that the States intended to reserve to themselves any part of the duty of regulating commerce with foreign nations or among the several States. The very nature of these duties suggests that dual control in these particulars was impracticable. Dual power of levying taxes in the States, although presenting vexatious problems as to the scope of authority of the respective sovereignties must, in the very nature of things, have been within the contemplation of the framers. It is to be observed, however, that the right to lay and collect taxes by the Federal Government is granted in the same clause which granted the power

to lay and collect duties and imposts, and that the power to regulate commerce between the States is granted in the same clause as the power to regulate commerce with foreign nations, but this fact does not compel the conclusion that as far as the question involved here is concerned the same limitations as to each of the powers must apply.

The Supreme Court of the United States in Brown v. Maryland, 12 Wheat. 419, 436, 439, held that the tariff duty was the levying of a tax upon the consumer of the imported article, and it held in substance in Adair v. United States, 208 U. S. 161, Gibbons v. Ogden, 9 Wheat. 1, 196, and the Lottery Case, 188 U. S. 321, 353, that under the power to regulate interstate commerce, the Federal Government could not exercise this power in violation of the fundamental rights of the States secured by the provisions of the Constitution. The soundness of these decisions, when applied to the facts in those cases, does not admit of doubt. Of course the Federal Government, under the guise of regulating interstate commerce, could not tax the commerce of a State out of existence, and the same principle would apply to the levying of a protective tariff duty in regulating foreign commerce, if it so burdened the States as to defeat the intent of the framers of the Constitution. Its power to regulate interstate commerce could not be exercised in such a way as to destroy the State's fundamental rights which it had not surrendered to the Federal Government. And just here lies the distinction between these cases and the case at bar.

How could the Federal Government regulate foreign commerce by the imposition of protective tariff duties or by embargo, and thereby control, in many instances, the volume of importations, if, at the same time, the State had the right to import for its own use, upon wholly different terms, the same merchandise. It is unthinkable that the framers of the Constitution ever contemplated that the duty of regulating foreign commerce was a joint function of the States and the Union, or that the duties of the Federal Government in this respect could be carried out if interference by the States in the same field of action was tolerated.

The Tariff Act of 1922, in its preamble, states:

An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes.

Most of its dutiable provisions are definitely aimed at protecting American industries through the regulation of foreign commerce. Furthermore, the act contains the flexible tariff provision which provides a special system of machinery for equalizing production costs without further investigation by Congress. It also contains the special proviso (section 316) for embargo and special duties which apply in case of unfair acts in the importation of merchandise. The act, therefore, is far more than a mere revenue act.

Regardless of whether the levying of a tariff duty is the laying of a tax upon the consumer of the imported article, as was held in Brown v. Maryland, supra, it is nevertheless in part the result of the exercise of the Federal Government of its power to regulate foreign commerce. See Hampton, Jr., v. United States, 276 U. S. 394. Since it is the exercise in part at least of the function of the Federal Government in regulating foreign commerce, and even though it be a tax, it is not such a tax as the Federal Government is, by the Constitution, barred from imposing upon the importer of goods.

That the imposition of duty on the particular item of importation at bar is in part the exercise by the Federal Government of its foreign commerce regulating power, is too obvious to require extended discussion here. The context of the act under consideration and the legislative history of the dutiable status of merchandise of this character unquestionably suggests that Congress sought by the levy of this particular duty to regulate in a measure the trade in this commodity with foreign nations.

It was within the intent of the framers of the Constitution that one means of regulating the foreign commerce was the imposition of protective duties. James Madison, ofttimes styled the father of the Constitution, and who probably, during his lifetime, was more familiar with the motives prompting the actions of the framers than any other human being, was unqualifiedly of the opinion that the levying of a protective duty was the exercise of the Constitutional power granted the Congress to regulate foreign commerce. In his letter of September 18, 1828, to Joseph C. Cabell, he emphatically expresses this view, giving his reasons therefor, at great length and with much clearness. This letter may be found at page 9590 of the Congressional

Record, Vol. 72, part 9, 71st Congress, Second Session. Among the many reasons assigned for concluding that the framers of the Constitution by the provision "the power to regulate commerce with foreign nations," had in mind the imposition of duties which equalized cost of production and thus fostered domestic manufactures, were the following:

The Constitution vests in Congress expressly "the power to lay and collect taxes, duties, imposts, and excises," and "the power to regulate trade."

That the former power, if not particularly expressed, would have been included in the latter as one of the objects of a general power to regulate trade is not necessarily impugned by its being so expressed. Examples of this sort can not sometimes be easily avoided and are to be seen elsewhere in the Constitution. * * *

Nor can it be inferred that a power to regulate trade does not involve a power to tax it, from the distinction made in the original controversy with Great Britain, between a power to regulate trade with the Colonies and a power to tax them. * * *

* * * * * * *

8. That the encouragement of manufactures was an object of the power to regulate trade is proved by the use made of the power for that object in the first session of the First Congress under the Constitution, when among the Members present were so many who had been members of the Federal convention which framed the Constitution, and of the State conventions which ratified it; each of these classes consisting also of members who had opposed and who had espoused the Constitution in its actual form. It does not appear from the printed proceedings of Congress on that occasion that the power was denied by any of them. And it may be remarked that Members from Virginia in particular, as well of the anti-Federal as the Federal Party, the names then distinguishing those who had opposed and those who had approved the Constitution, did not hesitate to propose duties, and to suggest even prohibitions, in favor of several articles of her production. By one a duty was proposed on mineral coal in favor of the Virginia coal pits, by another a duty on hemp was proposed to encourage the

growth of that article, and by a third a prohibition even of foreign beef was suggested as a measure of sound policy. (See Lloyd's Debates.)

In South Carolina v. United States, 199 U. S. 437, in discussing the powers of the Federal and State sovereignties to impose taxes, the Supreme Court of the United States said:

To determine the extent of the grants of power we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants.

It was there further said that:

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now.

Since it is clear that the States surrendered to the Federal Government the exclusive right to regulate foreign commerce by the imposition of import duties, it is unthinkable that they could have intended that the States themselves might import goods of every kind and character used in performing State functions and thereby render it impossible for the Federal Government to successfully and adequately regulate such commerce, and especially to regulate it so as to comply with the mandate "All duties, imposts and excises shall be uniform throughout the United States."

The fact is conceded, and it is certainly not contestable, that the right of a State to be immune from Federal taxation carries with it the immunity of all of its subdivisions—its counties, towns, cities, and all of their respective agencies, which perform a governmental function. Under the contention of appellant, all of these agencies would have the right to import free of duty all supplies of every kind and character used in building courthouses, jails, asylums, schools, roads, bridges, etc. They would have the right to import furnishings, books, clothing, tools and articles too numerous to enumerate as an incident of performing such governmental functions. Such enormous volume of importations by the States and their subdivisions would be

possible under such circumstances as would render impossible the successful uniform regulation by the Federal Government. The framers of the Constitution could not have reasonably intended such a power being reserved to the States.

In Willcuts v. Bun, 282 U. S. 216, the court said:

Before the power of the Congress to lay the excise tax in question can be denied in the view that it imposes a burden upon the States' borrowing power, it must appear that the burden is real, not imaginary; substantial, not negligible.

The court there referred to an excise tax, but obviously the framers of the Constitution, in providing that the Federal Government might levy import duties in its regulation of foreign commerce, could have no occasion to levy a duty which would result in burdening the State in the performance of its governmental functions. I do not think a customs duty nor an embargo, if applied in the regulation of foreign commerce of the nation could be or does result in such a burden.

Moreover, this is not a case where the Federal Government goes into the State and levies a tax upon some State governmental activity in such a way that if carried to the extreme it would paralyze the arm of the State Government. On the contrary, it is a case where the State goes outside the United States and buys merchandise and subjects it to laws wholly Federal in character. In bringing it into the commerce of the United States, the State comes in contact with and subjects itself to the Federal Government's laws regulating foreign commerce to which the State assented in the Constitutional convention.

The Federal Government, for more than 150 years, has exercised the exclusive power of regulating the importation of foreign articles, whether imported by a State or otherwise, and as far as I am able to learn, this is the first time in the nation's history that any State has presented for judicial decision the question of its right to import free of duty merchandise made dutiable by an act of Congress. My conclusion that the State has no such right is for the most part based on the consideration of the fact that the existence of such a right in the State is so wholly inconsistent and destructive of other rights granted to the

Federal Government as to be not within the contemplation of the framers of the Constitution.

It is admitted by the appellant that if its claim of free importation is not sustained, that the goods were properly classified by the collector.

The judgment of the United States Customs Court, overruling the protest and holding said merchandise dutiable as assessed, was proper.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS, OCTOBER TERM, 1931

Customs Calendar No. 43. Customs Appeal No. 3441

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Appellant,

v.

THE UNITED STATES, Appellee

GARRETT and LENROOT, Judges, dissenting (opinion by Lenroot):

We are compelled to dissent from the conclusion reached by the majority in this case as we are of the opinion that the protests of appellant should be sustained.

The case is of such importance that we feel constrained to express our views at length, not only with respect to those questions upon which we disagree with the views of the majority, but also with respect to those upon which we are in accord with the majority opinion.

Upon the state of facts set out in the majority opinion, two major questions are presented for determination:

1. Is the University of Illinois, an agency of the State of Illinois performing governmental functions; and, if so, are such functions of such a nature as to exempt property acquired by it, for the purpose of carrying on the educational activities of the university, from the imposition of taxes or duties imposed by Congress by virtue of clause 1, sec. 8, Article I of the Constitution of the United States, quoted in the majority opinion?

If the answer to the first question be in the affirmative,

2. May the classification and assessment by the collector of the merchandise here involved be sustained as an exercise of power by Congress under clause 3, sec. 8, Article I of the Federal Constitution, also quoted in the majority opinion?

The first question involves a consideration of the relative powers of the Federal Government and the State Government of Illinois with respect to the taxation by one of the property of the other.

That the University of Illinois is an instrumentality of the State of Illinois, performing governmental functions of that State, is established by the evidence in the case. It was created by a public law of the State of Illinois; its trustees are elected by the people of Illinois. The Governor and the Superintendent of Public Instruction are ex officio members of the Board of Trustees. It is controlled wholly by the legislature of the State and is supported mainly by legislative appropriations out of general tax levies by that State. Property acquired for the use of the university is paid for directly out of the Treasury of the State of Illinois. It is engaged in no activity primarily for profit, and all funds received by the university are devoted to instructional and educational purposes.

In the case of Thomas v. Industrial University [now the University of Illinois], 71 Ill. 310, 312, the court said:

Is this university, then, a State institution, or is it a private corporation? It has been largely endowed with funds by the State, received by donation for the purpose, from the general government. The act by which it is organized places its control under the authority of the State. The Governor is required to appoint, and the Senate to confirm, the trustees who control the institution, except the Governor and Superintendent of Public Instruction are made ex officio members of the board of trustees, for the management of the fund and the government of the university. There is nothing in the act from which it can be inferred that this institution was, in any respect, to be a private corporation, either in whole or in part. * * * Private individuals have no interest in or control over it, but it is, in every sense of the term, a State institution. It, with its property, management and control, is entirely

under the power of the General Assembly, and this has been recognized by the General Assembly by making subsequent appropriations for the erection of buildings, and to defray expenses, and by expressly prohibiting the board of trustees from obligating the State for the payment of any sum of money in excess of the appropriations thus made. Sec. 3, acts 1871-2, p. 143.

The character of the University of Tennessee was involved in the case of University of Tennessee v. People's Bank, 157 Tenn. 87, 6 S. W. (2d) 328. In this case the court in its opinion said:

We are of the opinion that the state, and the public represented by it, must be considered as the owner of property held by the University, and that the sovereign character of the state's ownership is not changed by the creation of the corporation as a convenient means through which the state exercises the strictly governmental function of educating the youth among its citizens. We are not able to find that the state has lost or divested itself of any element of sovereignty in the creation of this corporation which is subject to the will of the legislative branch of the state government in every particular, and the only purpose of which is to perform a governmental function.

In the leading case of Dartmouth College v. Woodward, 4 Wheat. 517, in considering the character of the charter of incorporation of Dartmouth College, the court said:

If the Act of Incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the Legislature of the State may act, according to its own judgment, unrestrained by any limitation of its power, imposed by the Constitution of the United States.

In the separate opinion of Mr. Justice Story in said case, the following is found:

* * * strictly speaking, public corporations are such only as are founded by the government, for public purposes, where the whole interests belong to the government. * * *

In the case at bar, the University of Illinois is an instrumentality of the State of Illinois, founded by that State for public purposes, and "the whole interests belong to," and its activities are under the control of, said State.

This fact alone, however, does not render the University of Illinois exempt from taxation by the Federal Government under said clause 1, sec. 8, Article I of the Federal Constitution, for the law is that an instrumentality of a State, even though performing only functions directed by the State, is not exempt from Federal taxation unless its activities are, as sometimes stated, of a strictly governmental character, as distinguished from those performed in the carrying on of an ordinary private business. South Carolina v. United States, 199 U. S. 437.

It is well established that the States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operation of the constitutional powers of Congress to carry into execution the powers vested in the general government. McCulloch v. Maryland, 4 Wheat. 315.

It is equally well established that the Federal Government has no power to tax the means and instrumentalities of the States engaged in the performance of essential governmental functions. Collector v. Day, 11 Wall. 113.

The case last cited involved the right of the Federal Government to impose a tax upon the salary of a judicial officer of the State of Massachusetts. It was held that no such power existed. In its opinion the court said:

* * * The Constitution guarantees to the States a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of

another government, which power acknowledges no limits but the will of the legislative body imposing the tax. * * *

The court said further:

* * * It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

In the case of Veazie Bank v. Fenno, 8 Wall. 533, a Federal tax upon the circulating notes of state banks was sustained. In its opinion the court, in discussing the nature of the tax there in question, said:

* * * It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

The principle declared in the cases above cited has been followed in many cases decided by the Supreme Court of the United States. One of the most recent of such decisions is the case of Willcuts v. Bunn, 282 U. S. 216. In the opinion in this case, written by Chief Justice Hughes, it is stated:

* * * The familiar aphorism is "that as the means and instrumentalities employed by the General Government to

carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the General Government." Ambrosini v. United States, 187 U. S. 1, 7. And a tax upon the obligations of a State or of its political subdivisions falls within the constitutional prohibition as a tax upon the exercise of the borrowing power of the State. Pollock v. Farmers' Loan & Trust Company, 157 U. S. 429, 584-586; id., 158 U. S. 601, 618; National Life Insurance Company v. United States, 277 U. S. 508, 521.

The limitation of this principle to its appropriate applications is also important to the successful working of our governmental system. The power to tax is no less essential than the power to borrow money, and, in preserving the latter, it is not necessary to cripple the former by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and *where no direct burden is laid upon the governmental instrumentality,* and there is only a remote, if any, influence upon the exercise of the functions of government. * * * (Italics ours.)

In the case of South Carolina v. United States, supra, there was presented to the Supreme Court of the United States for the first time the question of whether every function which a State may properly exercise, or activity in which it may engage, is immune from the Federal taxing power.

In that case it was held that a State may control the sale of liquor by the dispensary system, but when it does so it engages in ordinary private business which is not, by the mere fact that it is being conducted by a State, exempt from the taxing power of the national government. In the opinion, however, the observation was made that the tax there in question was not a tax upon property of the State.

After reviewing a large number of cases upon the subject of the exemption of the national government from taxation by the States, and the exemption of the States from taxation by the Federal Government, the court said:

These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of State agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental

character, and does not extend to those which are used by the State in the carrying on of an ordinary private business.

The court concluded its opinion in said case with the following:

Now, if it be well established, as these authorities say, that there is a clear distinction as respects the responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation.

In arriving at its conclusion in said case, the court adverted to a rule of construction that is material in the case at bar. In its examination of the powers granted in the Federal Constitution, it said:

To determine the extent of the grants of power we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants.

The court further said:

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and

meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded. * * *

In the case of Metcalf & Eddy v. Mitchell, 269 U. S. 514, speaking of the question of immunity from taxation, the court said:

While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power.

In the case of Panhandle Oil Co. v. Knox, 277 U. S. 218, the power of the State of Mississippi to tax sales of gasoline to the United States for the use of its Coast Guard fleet, in service in the Gulf of Mexico, and for its Veterans Hospital at Gulfport, was involved. It was held that such taxes, as applied to such sales, were void. In its opinion the court said:

* * * The States may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions. * * *

In the case of Indian Motocycle Co. v. United States, 283 U. S. 570, it was held that the sale of motorcycles to a State agency, such as a municipal corporation, for use in its police service, is not subject to taxation by the United States. In its opinion, after stating the principle of immunity from taxation involved, the court said:

Of course, the reasons underlying the principle mark the limits of its range. Thus, as to persons or corporations which serve as agencies of government, national or state,

and also have private property or engage on their own account in business for gain, it is well settled that the principle does not extend to their private property or private business, but only to their operations or acts as such agencies; and, in harmony with this view, it also has been held where a State departs from her usual governmental functions and "engages in a business which is of a private nature," no immunity arises in respect of her own or her agents' operations in that business. While these decisions show that the immunity does not extend to anything lying outside or beyond governmental functions and their exertion, other decisions to which we shall now refer show that it does extend to all that lies within that field.

From the foregoing cited cases it is apparent that upon this branch of the case the question for determination is whether public education, conducted through the instrumentality of a university wholly under the control of a State, supported in the main out of the public treasury, and whose property is owned by the State, is such an activity as should be deemed proprietary and therefore not immune from taxation by the Federal Government, or governmental, as distinguished from proprietary, and therefore immune from such taxation.

So far as we are able to discover, the United States Customs Court is the first court to pass directly upon this question. University of Illinois et al. v. United States, T. D. 43023, 54 T. D. 319. It was there held that the University of Illinois was not an instrumentality of the State of Illinois of strictly governmental character, and therefore was not exempt from taxation by the Federal Government. However, in the case at bar, the lower court assumed, without definitely deciding, that the University of Illinois was a governmental instrumentality of the State of Illinois, but overruled appellant's protests upon other grounds which we shall later advert to.

It will be noted that in the case of South Carolina v. United States, supra, the court said that, in determining the powers granted in the Federal Constitution, it is relevant to inquire what the men who framed and adopted the Constitution must have understood to be the meaning and scope of the grants.

It is a matter of history that Harvard University was founded in 1650. Its board of overseers was at first jointly

representative of State and Church. Until 1865 it was regarded as a State institution, when by an act of the Massachusetts Legislature the connection with the State was severed. Encyclopedia Britannica, (14th ed.), vol. 2, p. 230. We do not intimate that, at the time of the adoption of the Federal Constitution, Harvard University was in fact a public corporation, performing governmental functions of the State of Massachusetts, but refer to it only for the purpose of showing that at that time the conduct of higher education was regarded by the State of Massachusetts as one of the prerogatives of that State, acting in its sovereign capacity.

In the 1777 Constitution of the State of Vermont it was provided by section 40 as follows:

Section XL. A school or schools shall be established in each town, by the legislature, for the convenient instruction of youth, with such salaries to the masters, paid by each town; making proper use of school lands in each town, thereby to enable them to instruct youth at low prices. One grammar school in each county, and one university in this State, ought to be established by direction of the General Assembly.

It is an historical fact that, prior to the adoption of our Federal Constitution, many of the States had established public schools at the expense of local taxing districts.

Therefore, applying the test suggested in South Carolina v. United States, supra, we cannot say that the policy of education at public expense was an activity not known to the framers of the Constitution.

Furthermore, in the Ordinance of 1787, for the government of the Northwest Territory, out of which the State of Illinois was later carved, there is found in Article III the following declaration:

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, and the means of education shall forever be encouraged. * * *

It also appears that in the enabling act for Illinois, enacted by Congress in 1818, it was provided that three per cent of the net proceeds of the public lands within the State of Illinois should be appropriated by the Legislature

of the State "for the encouragement of learning, of which *one-sixth part shall be exclusively bestowed upon a college or university.*" (Italics ours.)

In this connection it is also pertinent to note the familiar passage in Washington's Farewell Message, wherein he said:

> Promote, then, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.

It is true that there is no mention of education in the Federal Constitution. The reason therefor, no doubt, was that its framers deemed that education, insofar as undertaken by public authority, was a function of the States and was one of those powers reserved to the States.

Certain it is that there is no grant of power in the Federal Constitution, express or implied, to Congress to control or in any way regulate education within the States, but this power has, from the time of the adoption of the Constitution, been regarded as within the sovereign power of the States, subject only to such personal and property rights of the citizen as are protected by the Federal Constitution.

We do not think that in this day it can be said that the conduct of an educational institution by a State is not a legitimate governmental function, nor do we believe that it is a function which should be classed as proprietary and of the general class held subject to taxation by the Federal Government in the case of South Carolina v. United States, supra.

In the brief of the Government it is contended that:

> A strictly governmental function is one that can only be performed by a State, such as the maintenance of a judicial system, as contradistinguished from a proprietary function which may be performed either by a State or by private persons or corporations, such as the maintenance of institutions of higher education, or a system for dispensing intoxicating liquors. Note Flint v. Stone, 220, U. S. 107, 172.

As a matter of fact, of which this Court will no doubt take judicial notice, the best, and no doubt the majority, of

institutions of higher education are maintained independently of any State, for example, Harvard, Yale, Princeton, Columbia, Johns Hopkins, Georgetown and George Washington Universities, and literally hundreds of other well known and renowned institutions of higher education too numerous to mention within the limited confines of this brief.

To assert that the maintenance by a State of an institution of higher education is a necessary adjunct to the existence of a State, desirable as it may be, is so obviously absurd as to require no further argument. Every State institution of higher education could be closed today without in the slightest degree endangering the sovereignty of a single State. Closing of such State-maintained institutions might inconvenience certain citizens of the respective States, and be unfortunate, but the State Governments would continue to function, and their sovereignty would remain unimpaired.

Said case of Flint v. Stone, 220 U. S. 107, relied upon by the Government to support its contention above quoted, does not even intimate that a strictly governmental function is one which can be exercised by a State only. In the opinion in that case it is stated:

* * * It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, *and to employ all necessary agencies for legitimate purposes of state government*, are not proper subjects of the taxing power of Congress. * * * (Italics ours.)

It is further stated in the opinion that:

In this connection South Carolina v. United States, 199 U. S. 437, 461, is important. In that case it was held that the agents of the state government, carrying on the business of selling liquor under state authority, were liable to pay the internal revenue tax imposed by the Federal Government. In the opinion previous cases in this court were reviewed, and the rule to be deduced therefrom stated to be that the exemption of state agencies and instrumentalities from national taxation was limited to those of a strictly

governmental character, and did not extend to those used by the State in carrying on business of a private charcter.

We think the words "strictly governmental", as used by the Supreme Court, do not mean exclusively governmental, as contended by the Government. If the Government be right in its contention, then many of the activities of the Federal Government are not "strictly governmental", but are subject to taxation by the States. We have a Bureau of Fisheries, and Government property is located in various States used for the propagation of fish. If the measuring rule applied by the Government in the case at bar to education be also applied to the Bureau of Fisheries, it must follow that the property of the United States, used for the propagation of fish, is not used in the performance of a "strictly governmental" function, and may be taxed by the States. Following the argument in the Government's brief, and substituting "fish hatcheries" for the words "an institution of higher education", and the words "Federal Government" for the words "a State", this paragraph of the Government's brief would read:

To assert that the maintenance by the Federal Government of fish hatcheries is a necessary adjunct to the existence of the Federal Government, desirable as it may be, is so obviously absurd as to require no further argument. Every fish hatchery of the Federal Government could be closed today without in the slightest degree endangering the sovereignty of the Federal Government. * * *

The same observation may be made as to most of the activities of the Department of Agriculture, the Department of Commerce, the Department of Labor and many of the independent establishments of the Government. In fact, most of the bureaus in these departments could be abolished "without in the slightest degree endangering the sovereignty" of the Federal Government.

Should any State attempt to tax the property of the Federal Government engaged in activities which are not "necessary adjuncts" to the existence of the Federal Government, we venture to say that the Department of Justice would be the first to repudiate the doctrine contended for in the Government's brief herein; nor are we left to speculation as to the attitude of the Supreme Court of

the United States if such tax by a State should be attempted.

In the case of Panhandle Oil Co. v. Knox, supra, as hereinbefore observed, the State of Mississippi attempted to tax sales of gasoline to the Federal Government for use by a Veterans' Hospital at Gulfport in that State. It was held that the State had no power to impose such tax because said hospital was an instrumentality of the United States.

If the conduct of a university by a State is proprietary because, as the Government contends, there are many private universities and colleges in the country, then by the same reasoning the conduct of a hospital is proprietary because there are thousands of private hospitals in the country. If hospitals conducted by the Federal Government are immune from taxation by the States, and the Supreme Court has expressly held that they are so exempt, although clearly not necessary to maintain the sovereignty of the Federal Government, we think it must follow that a State institution like the University of Illinois is likewise exempt from the general taxing power of the Federal Government.

We do not think that education has ever been within the domain of private business in the sense that educational activities conducted by a State should be considered as in the same class as sales of liquor by a State, such as involved in South Carolina v. United States, supra, or other business which is ordinarily conducted by private citizens for the purposes of profit.

The case of United States v. Baltimore & Ohio Railroad Company, 17 Wall. 322, involved the question of whether interest payable to the City of Baltimore, upon a loan made by the city to said railroad company as an inducement to said company to make Baltimore its eastern terminus, was exempt from taxation by the Federal Government. The loan was authorized by the Legislature of the State of Maryland.

It was held that such interest was so exempt; in its opinion the court said:

> This advance of the city bonds was not a donation. It was an investment supposed to be judiciously made and adequately secured. It was not for the individual benefit

of those managing the business. No one received advantage except as he was a citizen or his property was within the city. It was not a loan for the benefit of the railroad; it was for the benefit of the city solely. That the railroad company was also benefited did not affect the purpose of the transaction.

If the loaning of money by a city to a railroad company to advance the welfare of all the people of that city was the exercise of such a governmental function as exempted interest thereon paid to the city from taxation by the Federal Government, it would seem clear beyond any doubt that the conduct of education by a State, paid for and controlled by it, is the exercise of a strictly governmental function.

If there were any doubt with respect to this question, we think it has been definitely removed by the case of Burnet v. Coronado Oil and Gas Company, 284 U. S. —, decided since the case at bar was argued before us.

In that case, the State of Oklahoma leased to the Coronado Oil and Gas Company, upon a royalty basis, certain oil lands granted by the Federal Government to that State for the benefit of common schools established by it. The grant provided that such lands might be leased by the State.

The Commissioner of Internal Revenue assessed income and excess-profits taxes upon the lessee's net income arising out of the sale of its portion of the oil produced from said lands. The court held that such income was exempt from taxation upon the ground that the lease in question was an instrumentality of the State for the purpose of carrying out her duty in respect to the public schools.

In its opinion the court said:

When Oklahoma undertook to lease her public lands for the benefit of the public schools she exercised a function strictly governmental in character. Consequently, South Carolina v. United States, 199 U. S. 437, much relied upon, is not in point.

The States are essential parts of the plan adopted by the Federal Constitution; and we accept as settled doctrine that the United States can lay no tax upon their governmental instrumentalities. Texas v. White, 7 Wall. 700,

725; Collector v. Day, 11 Wall. 113; Pollock v. Farmers Loan & Trust Co., 157 U. S. 429, 584; Farmers Bank v. Minnesota, 232 U. S. 516, 527.

While four Justices dissented from the majority opinion in this case, and two dissenting opinions were rendered, none of the Justices dissented upon the ground that the maintenance of common schools by the State was not a strictly governmental function.

It is our opinion that education is a legitimate function of the States, and that the functions performed by the appellant here are strictly governmental in carrying out one of the sovereign powers of the State of Illinois, the exercise of which has never been, and can not now be, regarded as within the domain of the conduct of private business for profit.

The Government relies upon the fact that the University of Illinois is the recipient of Federal appropriations, as well as appropriations from the Treasury of the State of Illinois, for the purpose of carrying on its activities, as establishing that it is not a strictly governmental instrumentality of the State of Illinois. We think the fact that the University of Illinois is the recipient of Federal appropriations, made to the State for educational purposes, emphasizes, rather than otherwise, our view that the University of Illinois is a strictly governmental agency of the State of Illinois. Such appropriations are made in aid and encouragement of education, and it is because of the high public purpose that education serves that it is encouraged by appropriations by the Federal Government.

Neither does the fact that service fees are charged the students, resulting in a substantial revenue to the university, affect its character. Our Postoffice Department is largely supported by charges made for services rendered, but we do not think that any one would contend that, because of that fact, the functions performed by the postal service are not of a strictly governmental character.

The fact that a substantial percentage of the students of the University of Illinois are not residents of the State of Illinois is likewise immaterial. If the State of Illinois desires to give opportunity to residents of other States to enjoy educational facilities afforded and maintained by the State, such fact will not affect the nature of the govern-

mental function of the State providing education of the character here being considered.

It is probably true that a substantial percentage of the students in the public schools of the District of Columbia have parents who are not legal residents of the District of Columbia; but, if that be a fact, it would not affect the strictly governmental character of the functions performed by the schools of the District.

Neither do we think the fact that the University of Illinois is the recipient of certain comparatively small endowments affects its governmental character. We know of no reason why a State, if it sees fit, may not accept gifts to aid it in carrying on either absolutely necessary or other legitimate functions, and the acceptance of such gifts can not affect the character of the functions performed by the State.

While the Government makes some attempt to differentiate between elementary and higher education in the determination of whether the University of Illinois is an instrumentality of the State of Illinois performing strictly governmental functions, we think no such distinction can be made. We may take judicial notice of the fact that there are thousands of private elementary schools in the United States. One great religious denomination provides schools which are under its control for the education of the children of adherents to that faith. Other religious denominations to a lesser extent do likewise. According to the Government's theory, if an institution of higher learning be proprietary because there are many universities and colleges conducted under private auspices, then by the same reasoning all of the public schools of the country are proprietary, and the Federal Government may tax the income of every public school teacher in the land. If a tax by a State upon the sale of gasoline for use in a Federal hospital be invalid, would a direct tax imposed by the Federal Government, apportioned among the States, levied upon the lands and buildings used for school purposes, owned by the State or its subdivisions, be sustained as a valid exercise of the Federal taxing power? We do not think that anyone would seriously contend that such a tax would be valid, and we are unable to see any distinction, so far as the general taxing power of the Federal Government is concerned, between taxing such school buildings and taxing the property of the

State of Illinois held in trust for it by appellant, and used for educational purposes as required by the laws of the State of Illinois.

Furthermore, as bearing upon the interest of a State in education, it is well established that it is within the police powers of a State to compel the attendance of children between certain ages at some school, though it has no right to compel such attendance at a public school. Pierce v. Society of Sisters, 268 U. S. 510. In that case the court said:

> No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

With these broad police powers over education, it seems to us that it necessarily follows that, where the State itself deems it necessary or desirable for its welfare to provide schools at public expense in order that opportunity may be afforded for the education of children of the State, the exercise of such power by a State or its legally authorized subdivision is a strictly governmental function, and the conduct of an institution of higher learning by a State, or under an agency created and controlled by the State, is likewise a strictly governmental function.

Without pursuing this branch of the case further, we are of the opinion that appellant is an agency of the State of Illinois engaged in the performance of governmental functions which are immune from the general taxing power of the Federal Government under clause 1, sec. 8, Article I of the Constitution of the United States.

It is suggested that, even though appellant is immune from the general taxing power of the Federal Government under said clause, such immunity should not extend to import duties such as those here involved, upon the theory that while immunity from direct and excise taxes was reserved to the States, there was no such reservation as to the exaction of import duties. It is suggested that, inasmuch as the States retained their power to levy direct and excise

taxes, concurrently with the Federal Government, and surrendered in the Federal Constitution the right to levy import duties and granted to the Federal Government the sole power to levy such duties, it should be implied from these facts that the States, by virtue of their surrender of the power to levy import duties, surrendered their immunity from taxation through import duties levied by the Federal Government.

We cannot agree that any such implication arises from the surrender by the States of the right to levy import duties. We see no reason why the surrender of one right theretofore possessed should be construed as the surrender of another and different right possessed by the States. The right surrendered was the right possessed by the States to levy import duties. Another right possessed by the States was the immunity of governmental agencies of the States from Federal taxation. Why should it be held that a State may be taxed for the support of the Federal Government if the tax levied comes under the term of an import duty, but that it may not be taxed if it comes under the term of an excise tax?

In either case, a State in its sovereign capacity is called upon to contribute, out of its treasury, to the support of the Federal Government, and the tax is laid upon property of the State employed in the performance of essential governmental functions of the State.

We find no warrant, either in the Constitution or a decision of any court, for the segregation of import duties from direct and excise taxes, or for holding that the States are immune from one form of taxes named in the Constitution but not from another also therein named.

That an import duty under the clause of the Constitution here under consideration is a tax cannot be questioned; we can find no case where it has been questioned since the decision in Brown v. Maryland, 12 Wheat. 419, wherein Chief Justice Marshall said: "A duty on imports is a tax on the article paid by the consumer." The following is found in the decision of this court in United States v. Shallus, 9 Ct. Cust. Appls. 168, 171, 36 T. D. 391: "The definition of a duty is 'a tax on imposts; excise or customs dues'."

An action for debt will lie against an importer to recover duties upon goods imported. Stockwell v. United

States, 13 Wall. 531. To the same effect is Meredith v. United States, 13 Pet. 486.

If, therefore, an import duty is a tax, and if there be in the Constitution an implied exemption of the States from taxation by the Federal Government, insofar as their essential governmental functions are concerned, we are unable to perceive upon what theory the import duties here involved may be sustained, holding as we do that the University of Illinois is an instrumentality of the State of Illinois performing an essential governmental function of that State.

The majority opinion of the court below, as heretofore stated, assumed that the University of Illinois was an instrumentality of the State of Illinois engaged in the performance of a governmental function, but overruled the protests upon the ground that the payment of import duties by the appellant would not destroy the University of Illinois or noticeably impair its efficiency. In concluding said majority opinion it was said:

The plaintiff failed to show that the University would be destroyed if it were prevented from importing merchandise, and, indeed, probably could not make such a showing. The University expends yearly about five millions of dollars. Of this amount probably not to exceed five thousand dollars are spent for merchandise produced in foreign countries, or one one-hundredth of 1 per cent. It surely will not be seriously contended that to close the door to such importations would destroy the institution, or noticeably impair its efficiency.

The lower court, in arriving at its conclusion, relied especially upon the cases of Metcalf & Eddy v. Mitchell, supra, Willcuts v. Bunn, supra, and Educational Films Corp. of America v. Ward, 282 U. S. 379. It quoted from the first of these cases as follows:

In such a situation it can not be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way. * * * we do not find that it impairs in any substantial manner the ability of plaintiffs in error to discharge their obligations to the

State or the ability of a State or its subdivisions to procure the services of private individuals to aid them in their undertakings. Cf. Central Pacific Railroad v. California, 162 U. S. 91, 126. We therefore conclude that the tax in No. 183 was properly assessed.

It also quoted from Willcuts v. Bunn, supra, as follows:

Before the power of the Congress to lay the excise tax in question can be denied in the view that it imposed a burden upon the States' borrowing power, it must appear that the burden is real, not imaginary; substantial, not negligible.

It also quoted from Educational Films Corp. of America v. Ward, supra, as follows:

This court, in drawing the line which defines the limits of the powers and immunities of State and National Governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the same State. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the constitution, without undue interference by the other.

It is clear that the lower court failed to distinguish between a tax levied by the Federal Government directly upon a State or upon one of its instrumentalities performing only an essential governmental function, and a tax laid upon an individual or corporation engaged in private business, performing as a part of its business some governmental function. In each of the cases relied upon by the lower court, the taxpayer was engaged in business for profit, and was an instrumentality of government only in an incidental way. In none of said cases was the tax levied upon and paid by the State or one of its instrumentalities performing only essential governmental functions.

In the quotation relied upon by the lower court from the decision in Metcalf & Eddy v. Mitchell, supra, it was said:

In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense.

In the case at bar the tax is imposed directly upon an agency of government "in a technical sense," and is paid directly out of the State Treasury.

In the case of Willcuts v. Bunn, supra, it was held in effect that, even though the tax was not imposed directly upon an agency of government, nevertheless if the tax imposed a burden upon the States' borrowing power, and was real and not imaginary, substantial and not negligible, it could not be upheld. In the case at bar the burden is real, not imaginary, because directly imposed upon an agency of government, and actually paid by the State of Illinois.

We think the rule is well established that, where a tax is imposed directly by the Federal Government upon an agency of a State engaged wholly in the performance of an essential governmental function, such tax is invalid, and where the instrumentality is of this class, exemption does not depend upon the degree of burden. Gillespie v. Oklahoma, 257 U. S. 501; Metcalf & Eddy v. Mitchell, supra.

Evidently the lower court overlooked the principle last above stated, and that principle is founded upon an absolute want of power in the Federal Government to tax an instrumentality of a State engaged wholly in the performance of an essential governmental function. If there be want of power to levy a tax, the fact that the burden sought to be imposed is small is utterly irrelevant to the question of the validity of the tax.

In the case of Johnson v. Maryland, 254 U. S. 51, 55-56, the court said:

* * * With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since McCulloch v. Maryland, 4 Wheat. 316. The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the States to touch, in that way at least, the instrumentalities of the United States; 4 Wheat. 429, 430; and that is the law today. Farmers & Mechanics Savings Bank v. Minnesota, 232 U. S. 516, 525, 526. * * *

Of course, as heretofore shown, the same rule applies to the immunity of the States from Federal taxation as in the

case of the immunity of the Federal Government from taxation by the States.

In Indian Motocycle Co. v. United States, supra, the court said:

It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. Collector v. Day, 11 Wall. 113, 125, 127; Willcuts v. Bunn, 282 U. S. 216, 224-225. *Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute.* McCulloch v. Maryland, 4 Wheat. 316, 430; United States v. Baltimore & Ohio R. Co., 17 Wall. 322, 327; Johnson v. Maryland, 254 U. S. 51, 55-56; Gillespie v. Oklahoma, 257 U. S. 501, 505; Crandall v. Nevada, 6 Wall. 35, 44-46. (Italics ours.)

In our opinion, the foregoing authorities establish that, in a case like that at bar, the amount of the tax imposed, or whether its imposition would substantially interfere with or embarrass the State of Illinois, is wholly immaterial because, as stated in the last case cited, the exemption is absolute in the class of cases of which this is one.

The Government further contends that the regulation of foreign commerce is a plenary power conferred upon the Federal Government, and that the right to tax follows the right to regulate.

We cannot agree with the statement that the right to tax follows the right to regulate foreign commerce. Each are separate and independent powers, although contained in the same section of Article I of the Constitution. Government counsel have cited no cases in support of their contention that the right to tax imports follows the right to regulate foreign commerce, and we have found none.

We are clear that no grant of power can be implied from the commerce clause of the Federal Constitution that would

impair or destroy a right impliedly secured by other parts of the Constitution. That is to say, the immunity of the States from Federal taxation was not destroyed by the grant to the Federal Government of the right to regulate foreign commerce.

In the case of Adair v. United States, 208 U. S. 161, the court said:

* * * We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. Gibbons v. Ogden, 9 Wheat. 1, 196; Lottery Case, 188 U. S. 321, 353.

It is without doubt true that, where the power of taxation exists, it may be used as a means of regulating commerce. Indeed, said clause 1, sec. 8, Article I, expressly provides that Congress shall have power to lay taxes, duties and imposts to provide for the general welfare of the United States.

In the case of Hampton & Company v. United States, 276 U. S. 394, affirming upon review a decision of this court (14 Ct. Cust. Appls. 350, T. D. 42030), involving certain provisions of the Tariff Act of 1922, the Supreme Court, speaking through Chief Justice Taft, said:

So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes can not invalidate Congressional action. As we said in the Child Labor Tax Case, 259 U. S. 20, 38: "Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them, and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive." And so here, the fact that Congress declares that one of its motives in fixing the rates of duty is so to fix them that they shall encourage the industries of this country in the competition with producers in other countries in the sale of goods in this country, can not invalidate a revenue act so framed. * * *

It is our opinion that the commerce clause of the Constitution neither expressly nor by implication confers upon Congress any power to levy taxes upon any object otherwise immune from taxation. Therefore, if the States are immune from taxation by the Federal Government under clause 1, sec. 8, Article I of the Constitution, as they are in so far as they perform essential governmental functions, the grant of power in clause 3 of said section 8 does not affect such immunity, and the commerce clause of the Constitution may not be resorted to for the purpose of levying import duties upon the State in so far as they are engaged in the performance of essential governmental functions.

The Government makes two other contentions upon this branch of the case. The first is that there has been a legislative and administrative construction of the Constitution which warrants us in holding that the University of Illinois is not exempt from the imposition of duties levied upon merchandise imported by it to be used for educational purposes.

There is no proof in the record of any administrative construction or practice, and the only legislative construction relied upon is the fact that since 1897 the tariff acts have provided for free entry of certain merchandise imported by States, etc. for exhibition purposes, and the further fact that, from 1790 to 1862, scientific and philosophical apparatus was given free entry in the various tariff acts, and that since 1862 such merchandise has been at times dutiable and at other times free.

With respect to the provision for free entry of certain merchandise by States for exhibition purposes, we would observe that this was first provided for in the Tariff Act of 1897, and many years before that time, as we have shown, the Supreme Court of the United States had decided that the Federal Government had no power to impose taxes upon the States or their instrumentalities in so far as they were engaged in the performance of essential governmental functions. Obviously, a provision in a tariff law that under certain conditions free entry of merchandise should be accorded to the States cannot give rise to any implication that, otherwise, merchandise imported by States is subject to duty, when, long before the enactment of such law, it has in principle been determined by the Supreme Court of the United States that, under the

Constitution, Congress is without power to levy such a tax.

With regard to the Government's suggestion respecting the treatment of scientific and philosophical instruments in various tariff acts, we fail to see any relevancy whatever in such fact. It is not contended that Congress ever specified that such instruments, when imported by States or their instrumentalities, should be dutiable or free in the various tariff acts, but merely that such instruments generally should be free or dutiable.

The Government also points out that the Federal Government pays duties upon all merchandise imported for its own use, and it is argued that therefore it should be implied that it has a right to exact duties upon merchandise imported by the States for governmental purposes. Of course, the United States does not actually pay duties upon merchandise imported for its own use, except in form. What is paid out from the Treasury in the form of duties is immediately turned back to the Treasury in the form of revenue. When the transaction is completed, the Government is not poorer by one dollar, except that it has paid something in the way of expenses for the gesture of collecting money from itself. Of course it is done merely as a convenient means of bookkeeping and supervision of appropriations. It can have no bearing upon the question before us. Because a man may choose to transfer money from one pocket to another does not indicate that he has a right to reach into another man's pocket and transfer money he finds there to his own.

We now proceed to the next major contention of the Government, viz. that under the power to regulate commerce the importation of merchandise is a privilege, not a right, and Congress may lawfully exact, as a condition of the exercise of such privilege, the payment of the duties here in question.

If the paragraphs of the Tariff Act of 1922 here under consideration purported to be, or were in fact, primarily regulations of commerce, the question raised by the Government upon this branch of the case would be pertinent; but the duties provided under the various paragraphs of said act here involved do not purport to be, nor are they, in fact, primarily regulations of commerce. It is true that the title of the act declares it to be "An Act To Provide Revenue, to Regulate Commerce with Foreign Countries,

to Encourage the Industries of the United States, and for Other Purposes," and it is undeniably true that there are provisions of the act which depend for their validity upon the commerce clause of the Constitution. Section 305 is of this character, which prohibits the importation of the articles therein named; but the dutiable paragraphs of the act are primarily for revenue, and while commerce may also be incidentally regulated by the imposition of the duties provided for, the validity of their imposition must rest upon the taxing power granted by said clause 1, sec. 8, Article I of the Constitution.

Though not expressly stated, this is clearly implied in that part of the opinion of Chief Justice Taft in the case of Hampton & Company v. United States, supra, hereinbefore quoted. We repeat and italicise the first part of said quotation:

So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes can not invalidate Congressional action. * * *

In none of the paragraphs of said Tariff Act of 1922 fixing duties is there any indication that the primary purpose of the duties therein provided was not to raise revenue for the benefit of the general government.

If the contention of the Government, that the validity of the duties involved herein is not dependent upon the taxing power of Congress, but may be sustained under its power to regulate commerce, be valid, then it must follow that such duties are not governed by that part of said clause 1 which provides that "all duties, imposts and excises shall be uniform throughout the United States." It likewise would follow that, if the Government's contention be correct, none of the dutiable paragraphs of said tariff act are subject to said uniformity clause, for it may be contended with equal reason that all of them are regulations of commerce and do not depend for their validity upon the taxing power of Congress.

It has been established that regulations under the commerce clause are not controlled by the uniformity clause of said clause 1, sec. 8, Article I of the Constitution. Cooley v.

Board of Wardens of Port of Philadelphia, 12 How. 298; Alaska v. Troy, 258 U. S. 101.

However, it is unnecessary to pursue this discussion further because it has been established by the Supreme Court of the United States that the act of laying import duties is an exercise of the taxing power of Congress and not of the power to regulate commerce.

In the leading case of Gibbons v. Ogden, 9 Wheat. 1, 199, the court, speaking through Chief Justice Marshall, said:

> We must first determine, whether the act of laying "duties or imposts on imports or exports," is considered, in the constitution, as a branch of the taxing power, or of the power to regulate commerce. We think it very clear, that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section: "Congress shall have power to lay and collect taxes, duties, imposts and excises"; and before commerce is mentioned, the rule by which the exercise of this power must be governed, is declared. It is, that all duties, imposts and excises shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred. The constitution, then, considers these powers as substantive, and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. * * *

In the State Tonnage Tax Cases, 12 Wall. 204, the court, after citing Gibbons v. Ogden, supra, said:

> Whether the act of laying and collecting taxes, duties, imposts, and excises was a branch of the taxing power or of the power to regulate commerce, was directly under consideration in the case last cited, and it was conclusively settled that the exercise of such a power must be classed with the power to levy taxes. Had the Constitution, therefore, contained no prohibition, it is quite clear that it would have been competent for the States to levy duties on imports, exports, or tonnage, as they had done under the Confederation.

It has been suggested that the case of Russell v. Williams, 16 Otto 623, is contrary to the views expressed in the cases last above cited, but we are not of that opinion. That case involved the question of whether an Act of Congress imposing an additional duty of ten per centum ad valorem upon goods produced in countries east of the Cape of Good Hope, when imported from places west of the Cape of Good Hope, was impliedly repealed by a subsequent Act of Congress. The court held that it was not for the reason that said ten per centum additional duty was "intended as a general regulation of commerce." There was not involved the question of whether said ten per centum additional duty was a lawful exercise of the taxing power of Congress. It apparently was conceded that it was such; but the court found that it was intended also as a regulation of commerce. So construed, the decision is in harmony with Gibbons v. Ogden, supra, and the State Tonnage Tax Cases, supra, and is in harmony with the opinion of the Supreme Court in Hampton & Company v. United States, supra. The effect of the court's decision in Russell v. Williams, supra, is simply that, inasmuch as the act there under consideration, levying additional duties, had the incidental purpose of a regulation of commerce, it was not repealed by a subsequent act changing the ordinary rate of duties upon goods to which the additional duties applied.

This, we think, is made plain from that part of the opinion which states, after citing the case of Sturges v. The Collector, 12 Wall. 19, which involved the construction of the same Act of Congress as the court was there considering:

* * * The court, speaking through Mr. Justice Clifford, referred to the evident purpose of Congress, *not only to augment the revenue,* but to make a discrimination "in favor of the direct trade." * * * (Italics ours.)

Immediately following the language above quoted, the court said: "In conformity with the principle of these decisions, * * *," thereby clearly indicating the court's approval of the view expressed in Sturges v. The Collector, supra, that the purpose of Congress in providing the additional duty was to augment the revenue and hence the duty rested upon the taxing power of Congress, and, in addition, as an incident thereto, had the purpose of a regulation of commerce.

We would observe further, in this connection, that if said ten per centum additional duty involved in the case last cited could be considered as a regulation of commerce only, such additional duty would not be subject to the uniformity clause of said clause 1, sec. 8, Article I of the Constitution, and one rate of additional duty might have been made if importations of the character there being considered were entered at the Port of San Francisco, and a different rate of additional duty if entered at the Port of New York. We think no one would contend that such a law could be sustained as a regulation of commerce, separate and apart from the power to lay duties. Clearly, an additional duty that also serves as a regulation of commerce would be subject to the requirement of uniformity and, even though it was effective as a regulation of commerce and might be so considered for certain purposes, its validity must rest upon the taxing power of Congress and not upon the power to regulate commerce.

In the case at bar, as we have heretofore indicated, Congress had no power to levy the duties here in question under the taxing power granted by the Constitution, and it is our view, sustained by the cases hereinbefore cited, that an import duty cannot be sustained as a regulation of commerce alone when there is a want of power to tax the goods upon which the duty is laid for the purposes of revenue.

As it is our conclusion that the paragraphs of said Tariff Act of 1922 here involved do not constitute primarily regulations of commerce, but are an attempted exercise of the taxing power of Congress, it is unnecessary for us to consider the question of whether Congress has the power under the commerce clause of the Constitution arbitrarily to prohibit the importation of the merchandise here involved. Much of the argument in this case has been devoted to this question, the Government contending for, and the appellant denying, the existence of such power.

We may, for the purposes of this case, admit the Government's contention that the Government may arbitrarily place an embargo upon the importation of any goods, and that, as an incident of such power, it may conditionally permit the importation upon which it has a right to place an embargo. We repeat that there is nothing in the dutiable paragraphs of the Tariff Act of 1922 which indicates a purpose of Congress to impose duties primarily for the purpose

of regulation, but on the contrary it is clear that the primary purpose of the enactment of the dutiable paragraphs was to raise revenue, under the taxing clause of the Constitution.

For this reason, we consider that the question of the right of the Government arbitrarily to place an embargo upon merchandise of the character here involved is irrelevant to the determination of the question of the validity of the duties assessed upon the goods here involved.

The questions here considered are of the highest importance; there are involved the respective rights of the Federal Government and the States with respect to the immunity from taxation of the States by the Federal Government upon the one hand, and the immunity of the Federal Government from taxation by the States upon the other.

While it may be conceded that the conclusion we have reached may conceivably result in depriving the Federal Government of considerable revenue, it is also true that, if certain contentions of the Government were correct, a substantial part of the activities of the Federal Government would be subject to taxation by the States.

We think the conclusion we have reached is in harmony with the decisions of the Supreme Court of the United States, and is necessary if the respective sovereign rights of the States and the Federal Government are to be preserved.

In our opinion, for the reasons stated, the judgment of the United States Customs Court should be reversed and the cause remanded with directions to sustain the protests.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Monday, June 20, 1932.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 20th day of June, A. D., 1932.

Present: The Honorable William J. Graham, Presiding Judge, and the Honorables Oscar E. Bland and Finis J. Garrett, Associate Judges.

The court was opened for business in due form.

* * * * * * *

Customs Appeal No. 3441

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Appellant,

v.

THE UNITED STATES, Appellee

Said appeal having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

Ordered that the judgment of the United States Customs Court be, and the same is hereby, affirmed.

* * * * * * *

(Signed) William J. Graham, Presiding Judge.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

DOCKET ENTRIES

June 24, 1932.—Motion by appellant for extension of time in which to file petition for rehearing.

June 28, 1932.—Above motion approved and time extended to August 1, 1932.

July 22, 1932.—15 copies appellant's petition for rehearing filed.

July 28, 1932.—15 copies appellee's opposition to rehearing filed.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Monday, October 10, 1932.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 10th day of October, A. D., 1932.

Present: The Honorable William J. Graham, Presiding Judge, and the Honorables Oscar E. Bland, Charles S. Hatfield, Finis J. Garrett, and Irvine L. Lenroot, Associate Judges.

The court was opened for business in due form.

* * * * * * *

Customs Appeal No. 3441

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS,
Appellant,

v.

THE UNITED STATES, Appellee

Appellant having heretofore filed petition for rehearing herein, it is—

Ordered that said petition be, and the same is hereby, denied.

* * * * * * *

(Signed) William J. Graham, Presiding Judge.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

DOCKET ENTRIES

October 15, 1932.—Petition of appellant to stay final mandate pending application for writ of certiorari to the Supreme Court, filed.

October 17, 1932.—Above petition approved by Presiding Judge.

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Customs Appeal No. 3441

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS,
Appellant,

v.

THE UNITED STATES, Appellee

CERTIFICATE OF CLERK

I, Arthur B. Shelton, Clerk of the United States Court of Customs and Patent Appeals, do hereby certify that the

attached pages, numbered 1 to 165, inclusive, constitute a true and complete transcript of the record and certain proceedings had in said court in the above-entitled appeal, as the same remain of record and on file in this office.

Witness my hand and the seal of this court this twenty-first day of October, A. D., 1932.

Arthur B. Shelton, Clerk. [Seal of the United States Court of Customs and Patent Appeals.]

[fol. 152] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 9, 1933

The petition herein for a writ of certiorari to the United States Court of Customs and Patent Appeals is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 153] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF RECORD FOR USE ON HEARING OF WRIT OF CERTIORARI—Filed Jan. 12, 1933

It is hereby stipulated by and between counsel for the parties to the above-entitled cause that, in order to eliminate portions of the record unnecessary for consideration upon the hearing of the writ of certiorari granted in this cause and in order to reduce the cost of printing the record, the clerk in printing the record may eliminate the following portions of the printed record filed in connection with the submission of the petition for certiorari:

1. State statutes relating to University of Illinois. (R. 15-31.)
2. Drafts on State Treasurer, etc. (R. 50A-50E.)
3. Material at R. 51-60, consisting principally of colloquy between court and counsel relating to proof of State statutes and decisions.

[fol. 154] 4. Testimony of Lloyd Morey commencing with the fourth question on R. 60, relating to State court decisions affecting the University of Illinois and ending with the statement of Justice Young at the top of R. 63 reserving decision upon an objection to the admission in evidence of the report of a certain State court decision.

5. Additional testimony of Lloyd Morey relating to certain changes in the charter of the University of Illinois, beginning with the fourth question on R. 78 and ending with the following statement of Mr. Johnson on R. 79, "All right. That is all;" etc.

6. Requests for time to file briefs. (R. 80.)

7. Colloquy between court and counsel relating to certain customs protests not involved in the instant case. (R. 81-85.)

Sveinbjorn Johnson, Counsel for Petitioner. Thomas D. Thacher, Solicitor General.

January 10th, 1933.

[fol. 155] [File endorsement omitted.]

Endorsed on cover: File No. 37,235. U. S. Court of Customs and Patent Appeals. Term No. 538. Board of Trustees of the University of Illinois, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed December 6, 1932. File No. 37,235.

FILE COPY

FILED
DEC 6 1932
CHARLES ELMORE CROPLEY

No. 538

In the Supreme Court of the United States

OCTOBER TERM, 1932

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, PETITIONER

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No.....

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, PETITIONER

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS AND BRIEF IN SUPPORT THEREOF

PETITION

The Attorney General of the State of Illinois and the University Counsel, in behalf of the Board of Trustees of the University of Illinois, pray that a writ of certiorari issue to review the judgment of the Court of Customs and Patent Appeals entered in the above case on June 20, 1932, and made final by the denial of a petition for a rehearing on October 10, 1932 (R. 150), affirming the decision of the Customs Court (R. 87).

QUESTIONS PRESENTED

1. Whether, under the Tariff Act of September 21, 1922, C. 356, Title I, Sec. 1, 42 Stat. 858, and partic-

ularly paragraphs 218, 228, 360, and 372 thereof, the United States may compel the Board of Trustees of the University of Illinois to pay an ad valorem customs duty upon scientific instruments, to be used exclusively by the University of Illinois in imparting instruction, as a prerequisite to the right to bring such articles into the country, which equipment the University has purchased, and to which it has acquired full legal title abroad, because equipment of the type required was not obtainable in the United States.

Subordinate questions, implicit in the foregoing and discussed in the Court of Customs and Patent Appeals, are:

(a) Is conducting a state educational institution of the type of the University of Illinois, a strictly governmental function; and

(b) Is the body corporate, known as the Board of Trustees of the University of Illinois, a strictly public or governmental agency of the State of Illinois; and

(c) Is the customs duty or tax such a direct and substantial burden as to come within the prohibition of the doctrine that the federal government is without power directly to burden or embarrass the states or their governmental agencies when engaged in the performance of strictly governmental functions?

Statutes Involved

The statutes involved are set forth in the Appendix, pp. 25-28 infra.

Statement

By the Illinois Enabling Act a percentage of the proceeds of the sale of certain public lands, after January, 1819, was offered to the future State of Illinois and reserved for appropriation by the Legislature "for the encouragement of learning, of which one-sixth part shall be exclusively bestowed on a college or university." Act of April 18, 1818, Sec. 6, par. 5, 3 U. S. Statutes at Large 428, Appendix, p. 25 infra. By Ordinance of Illinois, Accepting Enabling Act, this offer was accepted. Laws of Illinois, 1819, First Session, App. p. 21, Appendix, pp. 25-26 infra. The Legislature of Illinois, by a public act approved February 28, 1867, created the petitioner a body corporate for the purpose of operating a state university. Laws of Illinois, 1867, p. 123, R. 15, 17, Appendix, pp. 26-27 infra. The institution was founded for the purpose of furnishing instruction in Liberal Arts, Agriculture, Engineering and Military Science; no tuition is charged (R. 65); certain service charges (R. 65) are collected, but the Government conceded that student fees "do not in any substantial degree support the University" (R. 48); the University is sup-

ported mainly by general property taxes levied upon the people of the entire State of Illinois (R. 13, 64, 67), and partly from appropriations of funds and of lands from the United States Government, and from Congress (R. 6, 64), and in part by the service charges aforesaid. All property, title to which is in the University and which is not held in trust under private arrangements, belongs to the State of Illinois (R. 63) and is listed by the State Auditor as "State Property" (R. 12).

On April 8, 1927, the Petitioner purchased in and imported from Germany a quantity of chemical glassware against which the Collector of Customs at the Port of Chicago assessed a 65% ad valorem duty (R. 32-33); in July, 1927, the Petitioner imported an electrical machine and parts on which the Collector collected a 30% ad valorem duty (R. 35-36); on June 2, 1927, the Petitioner imported an optical instrument on which the Collector collected an ad valorem duty of 45% (R. 37-38); and on April 23, 1928, the Petitioner imported scientific apparatus on which the Collector collected an ad valorem duty of 40% (R. 40-41). These customs taxes were paid by money drawn from the state treasury and appropriated to the Petitioner by the Legislature of Illinois (R. 47-50E, 73); the equipment upon which the tax was paid and collected was for the exclusive use of the University in imparting instruction (R. 75-76).

There was no controversy on the facts in the lower courts. Scientific instruments when imported by state universities were generally admitted free under Tariff Acts prior to that of 1922.

These exactions were all protested by the Petitioner and the merchandise was received by it. The protests were heard together before the Customs Court in Chicago, June 25, 1929, and the testimony offered was, by agreement, rendered applicable to all four (R. 43). On March 30, 1931, the Customs Court, speaking through two members, rendered a decision against the Petitioner, overruling all the protests, in which two opinions were written (59 T. D. 747, R. 87 ff.). An appeal was duly prosecuted to the Court of Customs and Patent Appeals where a decision, two justices dissenting, became final, on denial of a petition for a rehearing, on October 10, 1932, affirming the decision of the Customs Court (61 T. D., No. 26, p. 68, R. 98). On October 17, 1932, mandate was stayed by order of the Presiding Judge.

Specifications of Errors to Be Urged

1. The Court of Customs and Patent Appeals erred in holding that the ad valorem duties collected from the Petitioner upon scientific equipment, which was purchased abroad because not obtainable in the home market, were properly collectible and did not constitute

a prohibited burden upon, or an illegal tax on, property of the State of Illinois used by the latter in performing a strictly governmental function.

2. The Court of Customs and Patent Appeals erred in affirming the decision of the Customs Court.

Reasons for Granting the Writ

1. (a) The issue is of unusual and wide public importance; and it involves an important question of federal law. It concerns directly every major state university, and indirectly every state-owned and operated educational and charitable institution in the United States, and their freedom to obtain abroad scientific equipment of the highest order, without being taxed by the United States on every such purchase. The extent of this interest is, in part, evidenced by the fact that the Attorneys General of several important states joined in the argument below and now urge that a writ of certiorari be granted by the Supreme Court.

(b) The importance of this case is unequivocally attested by the author of the prevailing opinion in the Court of Customs and Patent Appeals. He says:

> "The question is one of vast importance and merits and has received the most careful consideration by counsel and the court." (R. 101.)

The dissenting judges say that,

> "The case is of such importance that we feel

constrained to express our views at length * * * * *"
(Rec. 118.)

2. The precise point involved has not, it is believed, been expressly decided by the Supreme Court, nor has it been decided by any state or federal court other than the Customs Court and the Court of Customs and Patent Appeals. This is presumably because the imposition of such a duty is a comparatively recent innovation (1922). It is, therefore, not possible to suggest a conflict in the decisions of lower tribunals, except that five opinions have been written against the contention of the Petitioner, but no two go upon the same grounds. Substantially, the only judicial unanimity disclosed in the record is in the conclusion that the Petitioner's protests must be overruled. A strong dissent, in which two members concurred, was filed in the Court of Customs and Patent Appeals. It seems probable that no sound ground of decision has been stated in any opinion overruling the Petitioner's protest.

3. The question is bound to recur again and again until resolved by the highest court in the land; the error, believed to constitute the groundwork of the conclusion of the lower court, is one which is prejudicial, both financially and otherwise, to the Petitioner and to state owned and operated educational and charitable institutions generally. There is involved directly the power of the Federal Government to collect annually

large sums, in the form of a customs tax, from the States.

4. We think the prevailing opinions in the Court of Customs and Patent Appeals misapplied and misconstrued the scope and effect of various decisions of this Court, notably Collector v. Day, 11 Wall. 113; Brown v. Maryland, 12 Wheat. 419, 436, 439; South Carolina v. United States, 199 U. S. 437; Hammer v. Dagenhart, 247 U. S. 251; Hampton & Co. v. United States, 276 U. S. 394; Brolan v. United States, 236 U. S. 216, and failed to appreciate the applicability of Adair v. United States, 208 U. S. 161, 180, and the distinction recognized by this Court between the power to levy specific charges under the commerce clause in aid of effective regulation of commerce, and the power to tax, for revenue purposes, in a strict and constitutional sense. The court failed to appreciate the essential difference between the primary purpose of an act of Congress in the constitutional sense, and the economic incidents resulting from the enforcement which may operate as regulations of commerce. It seems that the lower court confused separate powers—that over commerce and the taxing power—in such a manner as to obliterate the distinction between them, with the result that the conclusion reached is fallacious.

6. The decision seems to be in irreconcilable conflict with the reasoning of this Court in South Carolina v.

United States, supra. This Court there held the limitation stated in Collector v. Day, supra, inapplicable save in situations where strictly governmental functions were involved. Obviously this Court could not reason, as it did, that the argument against the power to levy the excise tax there challenged would lead to the conclusion that a State might import free of duty, except on the theory that the implied prohibition against federal burdens on state governmental agencies applied with like force to the exertion of the power to levy customs duties as to the exercise of the power to levy excise taxes; and if the duty could be sustained under the commerce clause, as held below, plainly this Court could not say, as Justice Brewer did, that "the same argument" would exempt importations by the State from duty, as, it was claimed, exempted the sale of liquor by the State from a license tax.

WHEREFORE, It Is Respectfully Submitted that the petition should be granted.

November, 1932.

OSCAR E. CARLSTROM,
Attorney General of Illinois.

SVEINBJORN JOHNSON,
Counsel for the Board of Trustees of the University of Illinois.

I am authorized by letters from the following Attorneys General to say that they join in this Petition for Certiorari, and, inasmuch as limitations of time preclude

the circulation of the original copy of the Petition for the personal signature of each official, I have accordingly affixed their names. While the theory of the case, both in this court and below, and the legal propositions advanced are well known to these officials, responsibility for the contents of the Petition and the Brief and for the form of statement is that of the undersigned.

SVEINBJORN JOHNSON.

U. S. WEBB,
Attorney General
of California.

L. A. FOOT,
Attorney General
of Montana.

JOHN FLETCHER,
Attorney General
of Iowa.

C. A. SORENSON,
Attorney General
of Nebraska.

ROLAND BOYNTON,
Attorney General
of Kansas.

JOHN J. BENNETT, JR.
Attorney General
of New York.

BAILEY W. WOOTTON,
Attorney General
of Kentucky.

JAMES MORRIS,
Attorney General
of North Dakota.

HENRY N. BENSON,
Attorney General
of Minnesota.

JAMES V. ALLRED,
Attorney General
of Texas.

GREEK L. RICE,
Attorney General
of Mississippi.

LAWRENCE C. JONES,
Attorney General
of Vermont.

BRIEF IN SUPPORT OF THE PETITION

Opinions Below

The opinions of the Customs Court (R. 87, 95) are reported in 59 T. D. 747. The opinions of the Court of Customs and Patent Appeals (R. 98, 118) are reported in 61 T. D., No. 26, p. 68.

Jurisdiction

The judgment of the Court of Customs and Patent Appeals became final through denial of a petition for rehearing on October 10, 1932, (R. 150); and mandate was stayed by order of the Presiding Judge on October 17, 1932, (R. 150). Jurisdiction is conferred on this Court by Section 195 of the Judicial Code, as amended by Act of June 17, 1930, C. 497, Title IV, Sec. 647, 46 Stat. 762 (Sec. 308, Title 28, U. S. C. A.), and Section 8, Act of February 13, 1925, C. 229, par. 8, 43 Stat. 940 (Section 350, Title 28, U. S. C. A.)

Question Presented, Statutes Involved, Etc.

The statement of the question presented, specification of errors to be urged, and a statement of the case appear in the petition. The statutes involved are printed in the Appendix, pp. 25-28 infra.

The Facts

The facts are stated in the petition, pp. 3-5. We emphasize that the importer is a creature of the legislature of the State, created for the sole purpose of operating a university; that the customs tax challenged was paid out of the general revenues of the State of Illinois; that the equipment was not obtainable in the home market; and that prior to the Tariff Act of 1922 scientific instruments, when imported by colleges and universities, came in duty free.

Argument

Conflict in Grounds of Decisions Below. Of the five opinions written overruling the Petitioner's Protest, no two proceed upon the same theory. When the question here presented was first before the Customs Court (54 T. D. 319) the opinion went upon the broad ground that the State of Illinois, in maintaining and conducting the University, was engaged in a proprietary activity and that, therefore, South Carolina v. United States, 199 U. S. 437, was conclusive authority upholding the power to levy and collect the customs tax. When the present case was before the Customs Court the author of the earlier opinion abandoned that theory and put his holding on the ground that the evidence did not show that the tax would "destroy the institution." Judge Cline concurred in the result, but adhered to the doctrine of the earlier case.

Presiding Judge Graham of the Court of Customs

and Patent Appeals, with whom agreed Judge Hatfield, seems to reject both grounds on which the Customs Court based its holding against the importer, and thinks that the customs duty may be sustained under either the power to tax or the power to regulate foreign commerce, or, perhaps, both in conjunction, arguing that the prohibition against burdening state governmental instrumentalities by federal taxes has no application within "a field entirely within the control of the national government." And Judge Bland seems not fully satisfied with the reasoning of his colleague or with that of any opinion of the Customs Court, but rests his conclusion on the sweeping and unsupportable generalization that the position of the Petitioner, if sustained, would be "wholly * * * destructive of other rights granted to the Federal Government." (R. 117-118.)

Petitioner is aware that it is the conclusion, not the reasoning, of the lower court with which this Court is concerned. It is respectfully submitted, however, that a conclusion in support of which such divers and contradictory reasons have been judicially advanced cannot be accepted as furnishing dependable guidance to the States in the future, and is, indeed, probably incorrect if the reasons assigned are untenable. We believe that both the holding and the supporting reasons are unsound and result from the misapplication of fundamental principles laid down by this Court in early and in recent cases.

Petitioner's Contention. The question presented is narrow. The Petitioner contends that the United States is without power to compel it to pay an ad valorem customs duty upon scientific instruments imported by it for use exclusively in connection with the operation of the state university, on the theory that the Petitioner is solely a governmental agency of and created by the State of Illinois and is engaged in performing a strictly governmental function.

Contention of the United States. The United States asserts that the source of this power may be found either in Art. 1, Sec. 8, Par. 3, of the Constitution of the United States, the clause giving Congress power to regulate foreign commerce, or in Art. 1, Sec. 8, Par. 1 thereof, which gives Congress the power to levy customs duties for revenue purposes.

Questions Not Presented. In view of the position taken by the United States in the lower court and the reasoning of the prevailing opinions against the Petitioner, we deem it advisable to point out specifically certain legal questions not directly or indirectly involved. The extent of the power of Congress under the commerce clause to exclude harmless articles from foreign commerce, or to enact regulatory measures relating to standards of quality governing the admission of articles, or otherwise to regulate the foreign trade by requiring

certain labels, descriptions, and conformity with defined formulas, binding alike upon all importers, whether sovereign states, acting in governmental or proprietary capacities, or private persons, is not properly in this case. The articles imported by the Petitioner are recognized as legitimate articles of foreign commerce; no regulatory measure concerning them has been adopted by Congress; and no condition upon their admission has been imposed save the payment of an ad valorem duty, that is, a tax for revenue purposes. The reliance placed on and the inferences drawn from the general language concerning the power of Congress to exclude articles from foreign commerce, used by this Court in The Abby Dodge, 223 U. S. 166 (regulations relating to the landing of sponges), in Buttfield v. Stranahan, 192 U. S. 470 (the importation of unwholesome tea), and in Brolan v. United States, 236 U. S. 216 (importation of opium), aside from the unwarranted disassociation of the general language from the particular facts, indicate a serious misunderstanding of the real question before the lower court, and a consequent misapplication of the doctrines of these cases.

No Power to Tax States or Their Governmental Agencies. There is no power in the national government to tax or impose direct burdens upon or embarrass such instrumentalities of the States as are used in the performance of strictly governmental functions. Col-

lector v. Day, 11 Wall. 113, 124; South Carolina v. United States, supra; and recently in Burnet v. Coronado Oil and Gas Co., 285 U. S. 393. The prohibition is implied, is reciprocal, and, as to the nation,

> "the immunity is derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words."

Clallam County v. United States and United States Spruce Corporation, 263 U. S. 341, 344; and as said in Collector v. Day, supra, at page 124,

> "The general government * * * in its appropriate sphere is supreme; but the States, within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."

Petitioner Is a Governmental Agency, and Conducting a University Is a Strictly Governmental Function. Educational bodies, such as state schools and universities, operated by the state and maintained by it, in whole or in part, out of funds raised by general taxation, or by funds which are the absolute property of the state, are agencies of the state government, are public corporations, and are engaged in performing strictly governmental, as distinguished from proprietary, functions. Thomas v. Industrial University, 71 Ill. 310, 312; University of Tennessee v. Peoples Bank, 157 Tenn. 87;

Sappington v. Commissioner of Internal Revenue, 25 B. T. A. 1385; Burnet v. Coronado Oil and Gas Co., supra.

The Customs Duty Is a Tax. The customs duty is "a tax on the article which is paid by the consumer." Brown v. Maryland, 12 Wheat. 419, 436, 439, per Marshall, C. J.; Hampton & Co. v. United States, 276 U. S. 394, 411, 412.

Primary Purpose of Tariff Act Is Revenue. The Court of Customs and Patent Appeals does not seem to have had a sound grasp of the true meaning of the concept, "primary purpose of an act of Congress,"—that it refers to the purpose of an act constitutionally considered. The motives and intent of Congress and the practical effect of enforcement of the law may be one thing, while the purpose, constitutionally considered, may be something else. The latter determines the fundamental nature of the law, notwithstanding the understood and intended economic incidents thereof may completely overshadow its primary—constitutional—purpose. That the primary purpose of tariff acts has, since the foundation of the Nation, been assumed to be revenue rather than regulation of commerce, is, in part, evidenced by the fact that tariff legislation has always designedly originated in the House of Representatives. Art. 1, Sec. 7, Par. 1. The intent of Congress in ar-

ranging the schedules of customs duties may have been to encourage—to regulate—certain industries within certain states, a purpose, which, if primary and "shown on the face of the act" (Drexel Furniture Co. v. Bailey, 259 U. S. 20, 43) would have been beyond the power of Congress; nevertheless, the act is constitutional because the primary purpose—in the constitutional sense—is revenue, although the desired and undisclosed economic results lie within a field beyond the power of Congress to enter. This precisely is the rationale of Hampton & Co. v. United States, supra. This principle has been so often enounced and applied by this Court that even a bare statement should, if made, be made with apologies, but for the fact that it seems to have been completely misunderstood and misapplied in the Court of Customs and Patent Appeals. The principle is illustrated in McCray v. United States, 195 U. S. 27; Knowlton v. Moore, 178 U. S. 41; Veazie Bank v. Fenno, 8 Wall. 533; United States v. Doremus, 249 U. S. 86; Hammer v. Dagenhart, 247 U. S. 251; and Drexel Furniture Co. v. Bailey, supra.

Power over Commerce Subject to Constitutional Restrictions. It has been settled law since Gibbons v. Ogden, 9 Wheat. 1, 22 U. S. 1, that

> "the power over commerce * * * is vested in Congress as absolutely as it would be in a single government having in its Constitution the same

> *restrictions* on the exercise of power as are found in the Constitution of the United States." (Emphasis ours.)

It is as complete—as paramount—as, but no more so than, the congressional power to tax. Drexel Furniture Co. v. Bailey, supra, 39. It is, therefore, not an absolute or arbitrary power. One of these "restrictions" is that no power shall be so exerted by Congress as directly and substantially to burden or embarrass the States in the exercise of strictly governmental activities. That this limitation applies to interstate commerce was specifically held in Adair v. United States, 208 U. S. 161, 180, the Court saying:

> "We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *Lottery Case*, 188 U. S. 321, 353."

This great tribunal, even when speaking of a power so vital to the very existence of the Nation as is that of taxation, has always spoken with tender regard for certain fundamental rights of individuals and States. It has made it plain that there is little room for the concept of arbitrary power in our constitutional scheme. In Veazie Bank v. Fenno, supra, 541, the court said:

> "There are, indeed, certain virtual limitations,

> arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution."

It is elementary, but overlooked by the lower court, that this principle is controlling with respect to all grants of power.

The Government and the lower court failed to apply or appreciate these principles and attributed to the commerce clause a primacy in excess of the limits laid down by this court. The lower court seems to have regarded Art. 1, Sec. 8, Par. 3, of the Constitution as a sort of residuary clause, supplying some, if not all, deficiencies of power suggested by limitations, express and implied, found in other parts of the instrument.

South Carolina v. United States. The Supreme Court, in this case, adopted the distinction between proprietary and governmental powers, as exercised by public corporations, and held, in effect, that a State should, for certain purposes, be regarded as a public corporation and within the rule. The earliest clear and concise statement of the doctrine in the United States appears in Lloyd v. City of New York, 5 N. Y. 369, 374 (1851) where it is said that a public corporation possesses two kinds of powers:

> " * * * one governmental and public, and to the extent they are held and exercised, is clothed with sovereignty—the other private, and to the extent they are held and exercised, is a legal individual."

In the South Carolina case the court, accordingly, held that when the state went into the liquor business it became a legal individual and that when the United States undertook to tax that "private business," the prohibition, against burdening or taxing state governmental agencies stated in Collector v. Day, and other cases, supra, had no application.

The prevailing opinions below show that the reasoning in this important case was overlooked, misapplied, and misunderstood. It is assumed by the lower court that the Petitioner is a governmental agency and that conducting a university is a strictly governmental function, but it is held that the limitation on congressional power defined in Collector v. Day is inapplicable because the power over commerce is exclusive and the rule is said not to govern in a field "common to both" State and Nation, such as the field of taxation, and the like.

The doctrine as thus applied is novel in our constitutional law, and the reasoning of Justice Brewer obviously escaped the attention of the majority members of the lower court. The learned Justice said:

> "The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a

> license tax would exempt the importation of merchandise by a State from import duty."

The point of the observation was that if the contention of South Carolina were sustained the State, by going into "private business," could dry up the sources of national income and destroy the Federal Government. Obviously this court could not say that the "same argument" would lead to the conclusion indicated by Justice Brewer, except for the fact that the implied prohibition against federal burdens on state governmental agencies applied with like force to the exertion of the power to levy customs duties as to the exercise of the power to levy excise taxes; and if a customs duty could be sustained under the commerce clause, as the majority opinion below seems to hold, plainly Justice Brewer and this court could not say that "the same argument" would exempt the importation from duty, as, it was claimed, exempted the sale of liquor from the license tax. The implied prohibition, then, contrary to the conclusion of the lower court, applies equally in the field of, so-called, exclusive powers, such as commerce, and in fields "common to both" State and Nation, such as taxation.

The "Police Power" Cases. The lower court misapplied the decisions of this court in Buttfield v. Stranahan, supra; The Abby Dodge, supra; Brolan v. United States, supra, and other analogous cases, where a prohibition of importation, total or partial, or save on stated

conditions, was considered. The lower court concluded that the power over foreign commerce, under the commerce clause, was plenary and absolute, overlooking the fact that in all such cases it was the character of the particular subjects dealt with which imparted to the prohibition the quality of regulation under the commerce clause. In Hammer v. Dagenhart, supra, this court said at page 270:

> "But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate."

Moreover, the question is not necessarily in this case, The writer of this brief knows of no case where this court has held that, whereas Congress has no power to exclude harmless commodities from interstate commerce, it may, *under the commerce clause*, exclude them from foreign commerce. Other powers, such as the war power, the treaty making power, etc., may and do authorize more extensive regulation of foreign than interstate commerce—an embargo is one such illustration—

but no such attempted regulation appears or is challenged in this case.

Conclusion

The question involves the constitutional power of the National Government to collect an ad valorem duty from the States upon state owned property to be used in the performance of strictly governmental functions, and is of great importance not only to the State of Illinois, but to all the States. We respectfully submit that the petition should be granted.

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Counsel for the Board of Trustees of the University of Illinois.

APPENDIX

Act of Congress, April 18, 1818, for the Admission of Illinois, 3 U. St. at Large 428:

> §6. *And be it further enacted*, That the following propositions be and the same are hereby, offered to the convention of the said territory of Illinois, when formed, for their free acceptance or rejection, which if accepted by the convention, shall be obligatory upon the United States and the said State.
> * * *
>
> *Third.* That five per cent. of the net proceeds of the lands lying within such State, and which shall be sold by Congress, from and after the first day of January, 1819, after deducting all expenses incident to the same, shall be reserved for the purposes following, viz.: two-fifths to be disbursed, under the direction of Congress, in making roads leading to the State; the residue to be appropriated, by the Legislature of the State, for the encouragement of learning, of which one-sixth part shall be exclusively bestowed on a college or university.
> * * *

Ordinance of Illinois, Accepting Enabling Act. Laws of Illinois, 1819. App., p. 21.

> Whereas, the Congress of the United States, in the Act entitled "An Act to enable the people of the Illinois Territory to form a Constitution and State government, and for the admission of such State into the Union on an equal footing with the original States," passed the 18th of April, 1818, have offered

to this convention for their free acceptance or rejection, the following propositions, which, if accepted by the convention, are to be obligatory upon the United States, viz.: * * *

3. That five per cent. of the net proceeds of the lands lying within such State, and which shall be sold by Congress from and after the first day of January, 1819, after deducting all expenses incident to the same, shall be reserved for the purposes following, viz.: Two-fifths to be disbursed under the direction of Congress, in making roads leading to the State; the residue to be appropriated by the Legislature of the State for the encouragement of learning, of which one-sixth part shall be exclusively bestowed on a college or university. * * *

Therefore, this convention, on behalf of, and by the authority of the people of the State, do accept of the foregoing propositions; * * *

Act for the Organization of Illinois Industrial University, approved February 28, 1867. Laws of Illinois, 1867, p. 123.

SECTION 1. * * * That it shall be the duty of the governor of this state within ten days from the passage of this act, to appoint five trustees, resident in each of the judicial grand divisions of this state, who, together with one additional trustee, resident in each of the congressional districts of this state, to be appointed in like manner, with their associates and successors, shall be a body corporate and politic, to be styled "The Board of Trustees of the Illinois Industrial University"; and by that name and style shall have perpetual succession, have power to contract and be contracted with, to

sue and be sued, to plead and be impleaded, to acquire, hold and convey real and personal property; to have and use a common seal, and to alter the same at pleasure; to make and establish by-laws, and to alter or repeal the same as they shall deem necessary, for the management or government, in all of its various departments and relations, of the Illinois Industrial University, for the organization and endowment of which provision is made by this act. Said appointments to be subject to approval or rejection by the Senate at its next regular session thereafter, and the appointees to be and they are hereby authorized to act as trustees as aforesaid, until their successors shall be appointed by the governor and such appointment shall be approved by the senate.[1] * * *

§19. This act shall be a public act and take effect and be in force from and after its passage.

Act of Congress, September 21, 1922 (Tariff Act of 1922), C. 356, Title I, Sec. 1, 42 Stat. 858.

An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes * * *

SECTION 1. * * * Except as otherwise specially provided for in this chapter, there shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of

---

[1]Nine trustees now (R. 26) and the name has been changed to University of Illinois (R. 30-31). The Governor and the State Superintendent of Public Instruction are ex officio members. All members are now elected (R. 7, 63).

Guam and Tutuila) the rates of duty which are prescribed by the schedules and paragraphs of the dutiable list of this title, namely; * * * [1]

Par. 218. Biological, chemical, metallurgical, pharmaceutical, and surgical articles and utensils of all kinds, including all scientific articles, utensils, tubing and rods, whether used for experimental purposes in hospitals, laboratories, schools or universities, colleges, or otherwise, all of the foregoing, finished or unfinished, composed wholly or in chief value of glass or paste, or a combination of glass and paste, 65 per centum ad valorem; * * *

Par. 228. Azimuth mirrors, sextants, and octants; photographic and projection lenses, opera and field glasses, telescopes, microscopes, and other optical instruments, and frames and mountings for the same; all the foregoing not specially provided for, 45 per centum ad valorem. * * *

Par. 360. Philosophical, scientific, and laboratory instruments, * * * and parts thereof, * * * 40 per centum ad valorem: * * *

Par. 372. * * * all other machines or parts thereof, finished or unfinished, not specially provided for, 30 per centum ad valorem; * * *

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[1]Repealed by Act of June 17, 1930, Chap. 497, Title IV, Sec. 651 (a) (1), 46 Stat. 762, 71st Congress.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 538

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE PETITIONER.

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SUPREME COURT OF THE UNITED STATES.

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vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE PETITIONER.

The Opinions Below.

The opinions of the United States Court of Customs and Patent Appeals (R. 63) are reported in 61 T. D. 1334. The opinions of the United States Customs Court (R. 51) are reported in 59 T. D. 747.

Jurisdiction.

The judgment of the Court of Customs and Patent Appeals became final through denial of a petition for rehearing on October 10, 1932 (R. 114); mandate was

stayed by order of the presiding judge of that court on October 17, 1932 (R. 115); petition for a writ of certiorari was filed in this Court on December 6, 1932; the petition was granted on January 9, 1933. Jurisdiction of this Court rests upon Section 195 of the Judicial Code, amended by the Act of June 17, 1930, C. 497, Title IV, Sec. 647, 46 Stat. 762 (Sec. 308, Title 28, U. S. C. A.), and Section 8, Act of February 13, 1925, C. 229, par. 8, 43 Stat. 940 (Sec. 350, Title 28, U. S. C. A.). Should the amendment to Sec. 195 of the Judicial Code, made by the Tariff Act of June 17, 1930, be regarded inapplicable, because the importation took place in 1927, the filing of a certificate of importance by the Attorney General would, nevertheless, be unnecessary, inasmuch as the instant proceeding draws in question the construction of the Constitution of the United States.

Questions Presented.

1. Whether, under the Tariff Act of September 21, 1922, C. 356, Title I, Sec. 1, 42 Stat. 858, and particularly paragraphs 218, 228, 360 and 372 thereof, the United States may compel the Board of Trustees of the University of Illinois to pay an ad valorem customs duty upon scientific equipment, to be used exclusively by the University of Illinois in imparting instruction, as a prerequisite to the right to bring such articles into the country, which equipment the University has purchased, and to which it has acquired full legal title abroad, because merchandise of the type required was not obtainable in the United States.

Subordinate questions, implicit in the foregoing and discussed in the Court of Customs and Patent Appeals, are:

(*a*) Is conducting a state educational institution, of the type of the University of Illinois, a strictly governmental function?

(*b*) Is the body corporate, known as the Board of Trustees of the University of Illinois, a strictly public or governmental agency of the State of Illinois? and

(*c*) Is the customs duty such a direct and substantial burden as to come within the doctrine that the federal government is without power directly to burden or embarrass the States or their governmental agencies when engaged in the performance of strictly governmental functions?

Statutes Involved.

The statutes involved appear in the Appendix, pages 30-33, *infra*.

Statement of the Case.

In 1928 the University of Illinois imported some scientific equipment for use in one of its departments. The Collector of Customs held the equipment subject to duty, under the Tariff Act of 1922, which was paid and duly protested; a hearing on the protest was had before the Customs Court at Chicago, on June 25, 1929, terminating in a decision against the importer. The importer contended that this scientific apparatus should be admitted duty free upon these grounds:

"1. Said tax is illegal and wrongfully assessed.

"2. The Federal Government has no authority to impose such duty upon imports made by the State of Illinois.

"3. Such goods are necessary instrumentalities to carry on the governmental operation of the State of Illinois.

"4. The University exercises governmental functions and needs the merchandise heretofore described in the execution of such functions and intends to use the same for such purpose.

"5. The assessment is paid to prevent seizure of the property of the University of Illinois."

As far as the author of this brief has been able to determine, the constitutional question in the instant case had been before a federal tribunal three times before it was submitted to the Court of Customs and Patent Appeals. First in 48 T. D. 728, where no evidence was introduced bearing on the question whether the University of Michigan was a part of the constitutional government of the State, whether it exercised governmental functions of the State, or whether the merchandise imported was to be used by the University for an educational purpose. The case is of no value as a precedent in the case at bar. It may be conceded that the Board of General Appraisers was correct in holding that that case could not be decided in favor of the University upon presumption alone and in the absence of evidence.

The second time the question was before the United States Customs Court was upon a protest filed by the University of Illinois. The case is reported in 54

T. D. 319. In that case the Customs Court, through Mr. Justice Young, held that conducting a university was not strictly a governmental activity, that the property of the institution was subject to the federal taxing power, and that the tariff duty was not a tax upon its franchises.

The question came before the United States Customs Court for the third time in the case of the *University of Illinois* v. *United States*. The opinion of the Customs Court is reported in 59 T. D. 747. The court held against the University, overruled the protests, and required the institution to pay the customs duty.

The facts are not in dispute. The Government offered no evidence. Concisely stated, the facts are as follows: The University of Illinois was organized as a public corporation under a public and general statute enacted by the General Assembly of the State of Illinois in 1867 (R. 5); it is controlled by a Board of Trustees, all of whom were originally named by the Governor (R. 6), but who (nine) are now elected by the people of the State of Illinois (R. 6, Smith-Hurd Revised Statutes of Illinois, 1931, Chap. 144, Sec. 41). The institution was founded for the purpose of furnishing instruction in Liberal Arts, Agriculture, Dentistry, Pharmacy, Law, Business Administration, and Fine Arts; no tuition is charged (R. 35); certain service charges, or fees, are collected from those enrolled (R. 35); student fees "do not in any substantial degree support the University," the Government conceded in the court below (R. 29); the University is supported mainly by taxes levied upon the people of the entire

State of Illinois (R. 12, 34, 37), and partly from appropriations of funds and of lands from the United States Government, and from Congress (R. 5, 34); it gives instruction in branches above the grade of the common school and of the high school; and the entire tax in the instant case was paid by money drawn from the State Treasury and appropriated by the General Assembly; the equipment upon which the tax was paid and collected was for use by the University in the operation of the institution and in imparting instruction under its charter powers (R. 46). All property, title to which is not held in trust under private arrangements, belongs to the State of Illinois (R. 33) and is listed by the State Auditor as "State Property" (R. 11). The University is supported by legislative appropriations out of general tax levies to the extent of over $5,250,000 annually (R. 7, 34, 37); the Governor and the Superintendent of Public Instruction are ex officio members of the governing board (R. 6) of eleven (R. 6, 33); the request for funds is included in the biennial budget submitted by the Governor to the General Assembly (R. 11); the Comptroller of the University reports regularly to the Governor and to the State Auditor (R. 33, 34); it has no endowments the income or principal of which is available for maintenance and operation; it is engaged in no activity primarily for profit (R. 36); and all funds received by the University are devoted to "instructional and educational purposes" (R. 35, 37).

The evidence also shows, without dispute, that an unsuccessful attempt was made to procure the merchandise in the United States, and that the policy and

practice of the institution is not to import in any case where the equipment needed can be purchased in the domestic market (R. 29, 31, 51). The merchandise consisted of electrical and optical machines and instruments and a certain type of glass. The title to the property passed to the Petitioner abroad (R. 42, 49). It was laboratory equipment not acquired for commercial use (R. 45, 46). Congressional appropriations are not available for the purchase of equipment of the kind imported (R. 48).

Specification of Errors Urged.

1. The Court of Customs and Patent Appeals erred in holding that the ad valorem duties collected from the Petitioner upon scientific equipment, which was purchased abroad because not obtainable in the home market, were properly collectible and did not constitute a prohibited burden upon, or an illegal tax on, property of the State of Illinois used by the latter in performing a strictly governmental function.

2. The Court of Customs and Patent Appeals erred in affirming the decision of the Customs Court.

Summary of Argument.

1.

The evidence shows without dispute that the University of Illinois is a public agency of the State; its charter may be and has been amended by the Legislature; its property is State property; and it is governed by State officers and supported by State appropriations.

Educational bodies, such as universities, State fairs, etc., operated by the State and maintained by it in whole or in part out of funds raised by general taxation, or by funds which are the absolute property of the State, are agencies of the State government, and usually are public corporations.

That the University is a governmental agency, is not alone conclusive against the existence of a power in the National Government to tax that instrumentality. In the light of the decision in *South Carolina* v. *United States*, 199 U. S. 437, a State agency is not exempt from federal taxation, unless it be employed in a strictly governmental function as distinguished from an activity which, in its essential nature, is merely "private business."

II.

When a public body or corporation is engaged in an activity, under a duty imposed upon it by the sovereign, from which neither that corporation nor the sovereign expects, or in fact receives, financial or material profit; which is mainly supported either by general taxation or by property or funds, from whatever source derived, that are the absolute property of the agency or of the sovereign; which, in the light of customary and current opinion, is believed to bring benefits, tangible or intangible, to all the people in their collective and individual capacities; and which, as a governmental activity, is sanctioned by time, the course and usage of the government, and the unbroken and universal acquiescence of the people, that is an activity of a strictly governmental character and the

National Government may not exercise the taxing power in such a way as directly to burden a public corporation or a State engaged therein. *Collector* v. *Day,* 11 Wall. 113, 124; *Dobbins* v. *Commissioner,* 16 Pet. 435. The Petitioner is such a corporation.

III.

It has been adjudged by this Court and has, indeed, become axiomatic, that this prohibition is none the less efficacious because implicit, rather than expressly stated, in the federal Constitution; that which is implied is as much a part of that instrument as that which is expressed. *South Carolina* v. *United States, supra; Collector* v. *Day, supra; Clallam Co.* v. *United States Spruce Corporation,* 263 U. S. 34.

IV.

No grant of power in one part, notwithstanding it may be characterized judicially as paramount, can be exerted in violation of any fundamental right secured by other parts of the national Constitution. That is to say, no grant of power can be implied from the existence of another power, if the result of such implication be to destroy a right otherwise expressly or impliedly secured. *Adair* v. *United States,* 208 U. S. 161, 180. Any other conclusion would lead to inconsistency and the mutual cancellation of conceded powers and restrictions. The independence of the States, within their legitimate spheres of action, and the independence of the National Government, in the exercise of the powers conferred upon it by the Con-

stitution, are basic concepts upon which the structure of the National Government is in part rested and without which dual sovereignty in fact would be nonexistent.

V.

A public body or corporation which the State has created for the more convenient exercise of a portion of its sovereign powers, to which have been assigned functions and duties which are of a strictly governmental character, is, together with the property and agents used and employed in the performance of such functions, outside the scope of the Federal taxing power.

> "If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence, the beginning of such taxation is not allowed."

United States v. *Railroad Co.*, 17 Wall. 322, per Hunt, Justice, 1872. The petitioner is such a corporation.

VI.

The tax challenged is one levied pursuant to the taxing power of the National Government. It is

> "* * * a tax on the article which is paid by the consumer."

Marshall, J., in *Brown* v. *Maryland*, 12 Wheat. 419, 436, 439. It is

> "* * * an enforced contribution to provide for the support of * * *"

the United States. *United States* v. *La Franca,* 282 U. S. 568, 51 S. Ct. 278, 280. The Tariff Act of September 21, 1922, in general, and paragraphs 218, 228, 360 and 372 of Section 1, in particular, are revenue measures. *Hampton and Co.* v. *United States,* 276 U. S. 394.

VII.

This Court has repeatedly held that Congress is wholly without power to levy a tax upon the States, upon the property of the States or their instrumentalities, used in the discharge of strictly governmental functions. The States cannot tax the Federal Government, or any of its instrumentalities. This prohibition is not expressed in the Constitution, but inheres in the necessities of the case. In *Collector* v. *Day, supra,* this Court said:

> "The general government * * * in its appropriate sphere is supreme; but the states, within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states."

These principles have been often affirmed, and, beyond a few landmarks in constitutional law, it is unnecessary to cite authorities. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Texas* v. *White,* 7 Wall. 700, 725; *Collector* v. *Day, supra; United States* v. *Railroad Co., supra; Veazie Bank* v. *Fenno,* 8 Wall. 533; *Railroad Co.* v. *Peniston,* 18 Wall. 5; *Panhandle Oil Co.* v. *Knox,* 277

U. S. 218; *Indian Motocycle Co.* v. *United States*, 51 S. Ct. 601, 283 U. S. 570; *Coronado Oil & Gas Co.* v. *United States*, 285 U. S. 393.

ARGUMENT.

1. Public corporations possess two kinds of powers: "* * * one governmental and public, and to the extent that they are held and exercised, is clothed with sovereignty—the other private, and to the extent that they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal government, and while in the exercise of the latter, is a corporate, legal individual." Lloyd v. City of New York, 5 N. Y. 369, 374 (1851).

The foregoing is quoted with seeming approval by this Court in *South Carolina* v. *United States*, 199 U. S. 437, 462. It represents the clearest early statement of the currently accepted distinction between governmental and proprietary capacities of public corporations.

Probably no satisfactory abstract differentiation between governmental and proprietary functions has been made. Indeed, it is believed that no *a priori* criterion, by which to distinguish the two types of function, can be stated. When a public corporation or agency is engaged in an activity, under a duty imposed upon it by the State (*Denver* v. *Davis*, 37 Colo. 370, 86 P. 1027; *Markwardt* v. *Guthrie*, 18 Okla. 32, 90

P. 26), from which neither it nor the State expects, or, in fact, derives financial or material profit; which is mainly supported by general taxation (*Welsh* v. *Rutland,* 56 Vt. 228, *Markwardt* v. *Guthrie, supra*), or by funds which are the property of the State; which, in the light of customary and current opinion, is believed to bring benefits, whether tangible or intangible, to the people in their collective and individual capacities; and which, as a governmental activity, is sanctioned by time, the course and usage of the government, and the unbroken and universal acquiescence of the people (*Loan Association* v. *Topeka,* 20 Wall. 655, 22 L. Ed. 455), that corporation or agency is engaged in an activity strictly governmental in character, and the Nation may not tax the property which the State uses in the performance of the function.

It is our belief that the conclusion is impelled by the analogies of the law that those public corporations which the States have created in order to operate their universities are engaged in performing strictly governmental functions.

There are certain services which, through long experience and by common consent, have come to be looked upon as peculiarly within the province of government, and which, although private corporations may, to a limited degree, perform some of them, are, nevertheless, such that the public interest is deemed better served by having the activities either under the control of, or performed by the government itself. In this class belong lawmaking, the administration of justice and enforcing peace and order and obedience to the law, fire protection, the protection of the public

health, and education of the citizens. There is substantial unanimity among the authorities in denying tort liability, in cases arising in these fields, on the ground that the function is governmental.

> "But neither the Amendment (Fourteenth)—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed the police power, to prescribe regulations to promote the health, peace, morals, *education* and good order of the people * * *."
>
> *Barbier* v. *Connolly*, 5 S. Ct. 357, 113 U. S. 27.

> "Education is one of the purposes for which what is called the police power may be exercised. Massachusetts always has recognized it as one of the first objects of public care."
>
> *Interstate Co.* v. *Massachusetts*, 207 U. S. 79, 87, per Holmes, Justice.

The only tribunal, as far as we know, that has held education to be proprietary rather than governmental in character is the Customs Court. *University of Illinois* v. *United States*, T. D. 43023, 54 T. D. 319. In the case at bar, however, the original author of that doctrine, Judge Young, seemingly abandoned that conclusion and held against the petitioner upon other grounds. Judge Cline still adhered to the earlier view. We think this position wholly untenable, and most seriously urge that such a conclusion as to higher education would be received by the bar and the bench of the country with the gravest misgivings. We believe that the decision of this Court in *Burnet* v. *Coronado*

Oil and Gas Co., 285 U. S. 393, although involving the common or grade schools, is conclusive in principle. We filed a brief as *amicus curiæ* in that case, dealing especially with this point; and the dissenting opinion by Judge Lenroot in the court below, beginning at page 1350, 61 T. D. 1334, fully and ably covers the subject from the legal and historical points of view. We, therefore, pass over this part of the argument without further comment except to refer to *Burnet* v. *Coronado Oil and Gas Co., supra,* our brief as *amicus curiæ* in that case, the dissenting opinion below (R. 83), and *Sappington* v. *Commissioner of Internal Revenue,* 25 B. T. A. 1385, where we also filed a brief as *amicus curiæ* on this point. We do not regard the question as reasonably debatable.

2. Petitioner is a governmental agency.

That the petitioner is in law a public, as distinguished from a private corporation, has long since been settled in Illinois. While this conclusion is not binding on this Court, it is strongly persuasive, especially in the light of the unanimous view of the highest State courts when examining into the character of State institutions organized on like principles. In *Thomas* v. *Industrial University,* 71 Ill. 310, 312, the court said:

> "Is this university, then, a State institution, or is it a private corporation? * * * There is nothing in the act from which it can be inferred that this institution was, in any respect, to be a private corporation, either in whole or in part * * * Private individuals have no

> interest in or control over it, but it is, in every sense of the term, a State institution. It, with its property, management and control, is entirely under the power of the General Assembly * * *."

To the same effect, see *Spalding* v. *People,* 172 Ill. 40; *People* v. *Board,* 283 Ill. 494, 499.

The instrumentalities which the States have created for the purpose of operating universities have generally been held to be public corporations, mere *instrumentalities* or *departments* of the State itself, created for greater convenience in exerting the State's sovereign power over the general field of education. In support of this generally accepted proposition we cite only a few authorities. *State* v. *Chase,* 175 Minn. 259, 220 N. W. 951; *Auditor* v. *Regents,* 83 Mich. 467, 468, 47 N. W. 440, 10 L. R. A. 376; *Oklahoma* v. *Willis,* 6 Okla. 593, 52 P. 921; *Neil* v. *Board, etc.,* 31 Ohio St. 15; *Russell* v. *Purdue University,* 201 Ind. 367, 168 N. E. 529, 65 A. L. R. 1384 (1929); *University* v. *Peoples Bank,* 157 Tenn. 87 (1928).

3. Congress may not tax the States or their governmental agencies.

There is no power in the National Government to tax or impose direct burdens upon or embarrass such instrumentalities of the States as are used in the performance of strictly governmental functions. *Collector* v. *Day,* 11 Wall. 113, 124; *South Carolina* v. *United States, supra; Indian Motocycle Co.* v. *United States,* 283 U. S. 570; and recently in *Burnet* v. *Coronado Oil*

and Gas Co., 285 U. S. 393. The prohibition is implied, is reciprocal, and, as to the Nation,

> "* * * the immunity is derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words."

Clallam County v. *United States* and *United States Spruce Corporation*, 263 U. S. 341, 344; and, as said in *Collector* v. *Day*, *supra*, at page 124,

> "The general government * * * in its appropriate sphere is supreme; but the States, within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."

The present Chief Justice, restating the maxim, says, in *Wilcuts* v. *Bunn*, 282 U. S. 216,

> "* * * that as the means and instrumentalities employed by the General Government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the General Government.'

It is equally an aphorism that the amount of the tax is legally unimportant, for the exemption, in this class of cases is absolute. *Indian Motocycle Co.* v. *United States*, *supra*; *Johnson* v. *Maryland*, 254 U. S. 51, 55-56. We make no attempt to cite the numerous decisions of this Court applying these axiomatic propositions.

4. The customs duty is a tax.

The customs duty is

> "* * * a tax on the article which is paid by the consumer."

Brown v. *Maryland*, 12 Wheat. 419, 436, 439, per *Marshall, C. J.; Hampton and Co.* v. *United States*, 276 U. S. 394, 411, 412. The lower court itself has defined a duty as

> "* * * a tax on imports."

United States v. Shallus, 9 Ct. Cust. Appeals 168, 171.

5. The Tariff Act of September 21, 1922 is a revenue measure in the constitutional sense, notwithstanding its provisions are so adjusted as to have a regulatory effect on commerce.

The Tariff Act is a revenue measure. The duties and the classifications are arranged so as to do the least harm and to bring the greatest advantage to domestic industry. This motive has always been present, in one form or another, whenever tariff acts have been under consideration, since 1789. This was pointed out by the late Chief Justice Taft, in *Hampton and Co.* v. *United States*, 276 U. S. 394, at page 411, where he said:

> "The enactment and enforcement of a number of customs revenue laws drawn with a motive of maintaining a system of protection, since the revenue law of 1789, are matters of history."

Continuing, he further said, at page 412:

> "So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes cannot invalidate congressional action."

That is to say, the Tariff Act of 1922 is a revenue act and not an act for the regulation of commerce. The late Chief Justice concluded:

> "And so here, the fact that Congress declares that one of its motives in fixing the rates of duty is so to fix them that they shall encourage the industries of this country * * * cannot invalidate a *revenue* act so framed." (Emphasis is ours.)

The lower court does not seem to have had a sound grasp of the true meaning of the concept, "primary purpose of an act of Congress"—that it refers to the purpose of an act constitutionally considered. The motives and intent of Congress and the practical effect of enforcement of the law may be one thing, while the purpose, constitutionally considered, may be something else. The latter determines the fundamental nature of the law, notwithstanding the understood and intended economic incidents thereof may completely overshadow its primary purpose. That the primary purpose of tariff acts has, since the foundation of the Nation, been assumed to be revenue rather than regulation of commerce, is, in part, evidenced by the fact that tariff legislation has always designedly originated

in the House of Representatives. Art. I. Sec. 7, Par. 1, Constitution of the United States. The intent of Congress in arranging the schedules of customs duties may have been to encourage—to regulate—certain industries within certain States, a purpose, which, if primary and "shown upon the face of the act" (*Drexel Furniture Co.* v. *Bailey,* 259 U. S. 20, 43) would have been beyond the power of Congress; nevertheless, the act is constitutional because the primary purpose—in the constitutional sense—is revenue, although the desired and undisclosed economic results lie within a field beyond the power of Congress to enter. This precisely is the rationale of *Hampton and Co.* v. *United States, supra.* This principle has been often enounced and applied by this Court. It is illustrated in *McCray* v. *United States,* 195 U. S. 27; *Knowlton* v. *Moore,* 178 U. S. 41; *Veazie Bank* v. *Fenno, supra; United States* v. *Doremus,* 249 U. S. 86; *Hammer* v. *Dagenhart,* 247 U. S. 251; and *Drexel Furniture Co.* v. *Bailey, supra.*

Regulations under the commerce clause (Art. I, Sec. 8, Par. 3) need not be uniform throughout the United States, *Clark Distilling Co.* v. *West. Mo. Ry. Co.,* 242 U. S. 311, 327, per White, C. J.; *Alaska* v. *Troy,* 258 U. S. 101. Customs duties and excises must be uniform. Art. I, Sec. 8, Par. 1. If the position of the lower court be sound, customs duties—Chief Justice Marshall pronounced them taxes—might be one thing at the port of Los Angeles and another for that of San Francisco, etc., and they would be sustained on the claim that they were assessed under the clause to regu-

late commerce, which does not require uniformity. Congress obviously cannot play ducks and drakes with these constitutional powers. The act under which the duty challenged is levied is, in general, a *revenue* act, and the particular paragraphs clearly are revenue provisions.

The lower court confused the power over commerce and the taxing power. When Congress enacts a law providing for import duties, it is exerting the taxing power, and not its power over commerce. This was settled as early as *Gibbons* v. *Ogden,* 9 Wheat. 1, 199, where Chief Justice Marshall says that the act of laying customs duties is an exertion of a "branch of the taxing power." To the same effect, see *State Tonnage Tax Cases,* 12 Wall. 204; and *Hampton and Co.* v. *United States, supra.*

6. The power over commerce is subject to certain constitutional limitations.

It seems, to the writer of this brief, that the lower court attributes to the commerce clause of the Constitution a potency beyond a fair, historically and judicially correct interpretation of its terms. It is our understanding that it has been settled law, since *Gibbons* v. *Ogden, supra,* that

> "* * * the power over commerce * * * is vested in Congress as absolutely as it would be in a single government having in its Constitution the same *restrictions* on the exercise of power as are found in the Constitution of the United States." (Emphasis is ours.)

It is as complete—as paramount—as, but no more so than, the congressional power to tax. *Drexel Furniture Co.* v. *Bailey, supra,* 39. It is, therefore, not an absolute or arbitrary power. One of these "restrictions" is that no power shall be so exerted by Congress as directly and substantially to burden or embarrass the States in the exercise of strictly governmental activities. That this limitation applies to interstate commerce was specifically held in *Adair* v. *United States, supra,* 180, the Court saying:

> "We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. *Gibbons* v. *Ogden,* 9 Wheat. 1, 196; *Lottery Case,* 188 U. S. 321, 353."

This great tribunal, even when speaking of a power so vital to the very existence of the Nation as is that of taxation, has always made it plain that there is little room for the concept of arbitrary power in our constitutional scheme. In *Veazie Bank* v. *Fenno, supra,* 541, the Court said:

> "There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution."

The petitioner has never questioned that the power of Congress over foreign commerce is wider than its power over interstate commerce; this results, however, not from the commerce clause, which grants the power to regulate commerce among the several States "in terms as absolute as is the power to regulate commerce with foreign nations" (*Brown* v. *Houston*, 114 U. S. 622, 630), but from the fact that a certain control over foreign commerce may be exerted through the exercise of constitutional powers other than those arising under the commerce clause. The grant (of power over interstate and foreign commerce) is in the same terms, "and the two powers are undoubtedly of the same class and character and equally extensive," *Bowman* v. *Chicago, etc., Ry. Co.*, 125 U. S. 465, 482; and "the power of Congress over interstate commerce is as absolute as is its power over foreign commerce," under the commerce clause. *Crutcher* v. *Kentucky*, 141 U. S. 47, 56. The petitioner repeats that Congress cannot justify a direct tax or burden on a State government or State governmental instrumentality, such as was imposed in this case, by standing on the taxing power, or on that over foreign commerce.

The lower court seems to assume that the power to declare an embargo—Justice Story said that

> "* * * the embargo * * * stands on the extreme verge of the Constitution,"

Story, I, 185, Autobiographical Sketch, 1831—is sustainable exclusively under the *commerce* clause, whereas

its validity rests more logically on the doctrine of "resulting powers" (resulting or implied from a number of enumerated powers), adverted to by Justice Story in his Commentaries on the Constitution of the United States, Book III, Chap. XXIV, but to be carefully differentiated from the concept of inherent powers derived from the notion of "inherent sovereignty" hereinafter considered.

The lower court seems to have regarded Art. I, Sec. 8, Par. 3, of the Constitution as a sort of residuary clause, supplying some, if not all, deficiencies of power suggested by limitations, express and implied, found in other parts of the instrument.

This Court has cautiously applied this doctrine of implied limitation; and it has maintained in careful balance the purpose thereof to preserve State sovereignty, on the one hand, and the intention of the framers of the Constitution to found a sovereign Nation, on the other. There are many express reservations and prohibitions in the Constitution calculated to secure the independence of the States, but, in our judgment, this implied restriction is the last or innermost redoubt, fostered by the far-seeing wisdom of this Court, for their protection against attack from any quarter, regardless of the form of implied or enumerated power in which Congress may panoply its attemped invasion of their right to uphold their own strictly governmental institutions. No principle of constitutional law, and no aspect of economic or public policy, it is respectfully urged, sanction the novel theory concerning the inviolable supremacy of the

ower over commerce exemplified in the decision of
e majority below. Deferentially, but earnestly, we
rge that the grounds thus far advanced in support of
holding against the petitioner, both by the Govern-
ent below and by the Court of Customs and Patent
ppeals, seem but "sharp reasons to defeat the law."

7. The extent of the power of the United States to evy customs duties on importations by State governmental instrumentalities, is measured by the same principles as in the case of excise taxes.

The lower court seems to have misinterpreted the important decision of this Court in *South Carolina* v. *United States, supra.* In that case this Court held that when South Carolina went into the liquor business it took on the character of a private person, with the result that when the United States undertook to tax that "private business," the prohibition, against burdening or taxing State governmental agencies had no application. It is assumed by the lower court that the petitioner is a governmental agency and that conducting a university is a strictly governmental function, but it is held that the limitation on congressional power defined in *Collector* v. *Day* is inapplicable, because the power over commerce is exclusive, and the rule is said not to govern in a field "common to both" State and Nation, such as the field of taxation and the like.

The reasoning of Justice Brewer obviously escaped the attention of the majority members of the lower court. The learned justice said:

> "The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty."

The point of the observation was that if the contention of South Carolina were sustained, the State, by going into "private business," could dry up the sources of national income and destroy the Federal Government. This Court could not, it seems, say that the "same argument" would lead to the conclusion indicated by Justice Brewer, except for the fact that the implied prohibition against federal burdens on State governmental agencies applied with like force to the exertion of the power to levy customs duties as to the exercise of the power to levy excise taxes; and if a customs duty could be sustained under the commerce clause, as the majority opinion seems to hold, plainly Justice Brewer and this Court could not say that "the same argument" would exempt the importation from duty, as, it was claimed, exempted the sale of liquor from the excise tax. The implied prohibition, then, contrary to the conclusion of the lower court, applies equally in the field of, so-called, exclusive powers, such as commerce, and in fields "common to both" State and Nation, such as taxation.

Assume a law laying an excise on the right to engage in interstate commerce and in commerce with the Indian tribes—an assumption the validity of which seems to be established by *Woodruff* v. *Parham*, 8 Wall. 123. Obviously, if the lower court is correct in holding that the *commerce* clause gives Congress power to levy *customs* duties it must also imply a

power to levy excise taxes on interstate commerce, a proposition which we deny *in toto*. It seems that the argument and conclusion of the lower court lead to the doctrine that when the State of North Dakota—it has no native stone quarries of any kind—must build a new Capitol, because fire destroyed the old structure, and decides to build with stone, Congress may compel that State to pay a tax for the privilege of introducing granite from New Hampshire or limestone from Indiana into interstate commerce for the sole purpose of effectively performing the strictly governmental function of housing its own officers. Or should the State of Minnesota require fire arms for its militia from a Connecticut factory, a like tax could be imposed. The anomaly of denying Congress the power to authorize a tax on the sale of a motorcycle to a city for a policeman's use (*Indian Motocycle Co.* v. *United States, supra*) as a direct and unconstitutional burden on a strictly governmental instrumentality, and permitting such a direct burden when imposed in the assumed exercise of the power over commerce, or of the taxing power over commodities in interstate commerce, seems to have escaped the notice of the lower court. To enforce the implied limitation of power in the one instance and deny its applicability in the other, as did the lower court, appears to us indefensible alike on authority and principle.

8. The extent of the general power of Congress over foreign commerce is not properly at issue in this case.

In our view of this case, the petitioner may safely concede that Congress may, under some grant, or a

totality of grants, of power, in some circumstances, refuse permission to bring the articles in question into the country; Congress, however, has *not* done so, but admits the merchandise in question without any pretense of regulation, save such as incidentally results from the imposition of a tax, imposed *under the taxing power and for the avowed purpose of revenue.* Congress imposes a burden on a sovereign State which, as we think, is *impliedly beyond its constitutional power.*

The extent of the general power of Congress to *regulate* or to *prohibit* foreign commerce, in whole or in part, is not properly an issue in this case; but the real question is whether, Congress having attempted neither a prohibition nor a regulation of, but a *tax* on importations for *revenue purposes,* a State may be taxed on its own property, as is here attempted.

9. If the power to levy the duty challenged is neither an express nor an implied power, it cannot be sustained as an exercise of an inherent power.

There is no such thing as an inherent sovereign power which Congress may exercise notwithstanding it is not expressed and cannot be implied from any granted power. We dismiss this subject with the statement that the doctrine of inherent sovereign powers—sometimes advanced in Congress, and by text writers—has been definitely repudiated by this Court. *Kansas* v. *Colorado,* 206 U. S. 46. The concept, said Justice Brewer in this case.

> "* * * is in direct conflict with the doctrine that this is a government of enumerated powers."

For these reasons it is respectfully submitted that the decision of the lower court should be reversed and the protest of the petitioner sustained.

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February, 1933.

We think the constitutional questions discussed in this brief are of the highest importance. We concur in the arguments advanced and join with the State of Illinois in denying the existence of the power in the National Government to levy and collect the tax protested by the University of Illinois as an importer of scientific instruments for use exclusively for educational purposes in a department of the University.

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APPENDIX.

Statutes Involved.

Act of Congress, April 18, 1818, for the Admission of Illinois, 3 U. St. at Large 428:

> § 6. *And be it further enacted,* That the following propositions be and the same are hereby, offered to the convention of the said territory of Illinois, when formed, for their free acceptance or rejection, which if accepted by the convention, shall be obligatory upon the United States and the said State. * * *
>
> *Third.* That five per cent of the net proceeds of the lands lying within such State, and which shall be sold by Congress, from and after the first day of January, 1819, after deducting all expenses incident to the same, shall be reserved for the purposes following, viz.: two-fifths to be disbursed, under the direction of Congress, in making roads leading to the State; the residue to be appropriated, by the Legislature of the State, for the encouragement of learning, of which one-sixth part shall be exclusively bestowed on a college or university. * * *

Ordinance of Illinois, Accepting Enabling Act. Laws of Illinois, 1819. App., p. 21.

> Whereas, the Congress of the United States, in the Act entitled "An Act to enable the people of the Illinois Territory to form a Constitution and State government, and for the admission of such State into the Union on an equal footing with the original States," passed the 18th of

April, 1818, have offered to this convention for their free acceptance or rejection, the following propositions, which, if accepted by the convention, are to be obligatory upon the United States, viz.: * * *

3. That five per cent of the net proceeds of the lands lying within such State, and which shall be sold by Congress from and after the first day of January, 1819, after deducting all expenses incident to the same, shall be reserved for the purposes following, viz.: Two-fifths to be disbursed under the direction of Congress, in making roads leading to the State; the residue to be appropriated by the Legislature of the State for the encouragement of learning, of which one-sixth part shall be exclusively bestowed on a college or university. * * *

Therefore, this convention, on behalf of, and by the authority of the people of the State, do accept of the foregoing propositions; * * *

Act for the Organization of Illinois Industrial University, approved February 28, 1867. Laws of Illinois, 1867, p. 123.

SECTION 1. * * * That it shall be the duty of the governor of this state within ten days from the passage of this act, to appoint five trustees, resident in each of the judicial grand divisions of this state, who, together with one additional trustee, resident in each of the congressional districts of this state, to be appointed in like manner, with their associates and successors, shall be a body corporate and politic, to be styled "The Board of Trustees of the Illinois Industrial University"; and by that name and style shall have perpetual succession, have

power to contract and be contracted with, to sue and be sued, to plead and be impleaded, to acquire, hold and convey real and personal property; to have and use a common seal, and to alter the same at pleasure; to make and establish by-laws, and to alter or repeal the same as they shall deem necessary, for the management or government, in all of its various departments and relations, of the Illinois Industrial University, for the organization and endowment of which provision is made by this act. Said appointments to be subject to approval or rejection by the Senate at its next regular session thereafter, and the appointees to be and they are hereby authorized to act as trustees as aforesaid, until their successors shall be appointed by the governor and such appointment shall be approved by the senate.[1] * * *

§ 19. This act shall be a public act and take effect and be in force from and after its passage.

Act of Congress, September 21, 1922 (Tariff Act of 1922), C. 356, Title I, Sec. 1, 42 Stat. 858.

An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes * * *

SECTION 1. * * * Except as otherwise specially provided for in this chapter, there

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[1]Nine trustees now (R. 6) and the name has been changed to University of Illinois (R. 6). The Governor and the State Superintendent of Public Instruction are ex officio members. All members are now elected (R. 6, 33).

shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila) the rates of duty which are prescribed by the schedules and paragraphs of the dutiable list of this title, namely; * * *[2]

Par. 218. Biological, chemical, metallurgical, pharmaceutical, and surgical articles and utensils of all kinds, including all scientific articles, utensils, tubing and rods, whether used for experimental purposes in hospitals, laboratories, schools or universities, colleges, or otherwise, all of the foregoing, finished or unfinished, composed wholly or in chief value of glass or paste, or a combination of glass and paste, 65 per centum ad valorem; * * *

Par. 228. Azimuth mirrors, sextants, and octants; photographic and projection lenses, opera and field glasses, telescopes, microscopes, and other optical instruments, and frames and mountings for the same; all the foregoing not specially provided for, 45 per centum ad valorem. * * *

Par. 360. Philosophical, scientific, and laboratory instruments, * * * and parts thereof, * * * 40 per centum ad valorem: * * *

Par. 372. * * * all other machines or parts thereof, finished or unfinished, not specially provided for, 30 per centum ad valorem; * * *

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[2]Repealed by Act of June 17, 1930, Chap. 497, Title IV, Sec. 651 (a) (1), 46 Stat. 762, 71st Congress.

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CHARLES ELMORE C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1932

No. 538

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

REPLY BRIEF FOR PETITIONER

SVEINBJORN JOHNSON,
Counsel for Petitioner

OTTO KERNER,
Attorney General of Illinois

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REPLY BRIEF FOR PETITIONER

UNIVERSITY PRINTING

On page 35 of the Defendant's brief it is said that Petitioner "prints—and sells books—as a private publishing house." No syllable of evidence before this court supports this statement. It is doubtless a wholly inadvertant error. The University does, in fact, print some bulletins and reports as does the national government, but most are distributed free. In 1926, according to the evidence in the first case in the Customs Court, the deficit in printing operations was over $90,000 with receipts of only $4,000. We trust Counsel is mistaken if he

means to say that our printing experience parallels that of any "private publishing house."

Certain Administrative Practices

Point is made of the fact that in some instances states have paid duties on merchandise to be used for governmental purposes; and in other instances states have questioned this power but accepted administrative rulings against free importation. The fact that states have paid rather than litigate is not even persuasive on the question of constitutional power, especially in view of the fairly liberal exemptions until the Tariff Act of 1922; and interpretation by the Treasury Department is without significance because, as said by Mr. Moss, (Government Brief, page 62) " . . . . it is not a function of the Department to determine the constitutionality of the tariff act as relating to the importation of merchandise by State Governments, ... " Similarly, Honorable Andrew Mellon (Government Brief, p. 61) points out that the "Department is vested with no discretionary power" in this behalf.

Scientific Instruments Originally Exempt from Duty

The Tariff Act of August 10, 1790, admitted "philosophical apparatus" free when brought in for a semi-

nary of learning. This included scientific instruments, Dr. Johnson's Dictionary of the English Language, Edition of 1786. Section 2, Act of April 27, 1816, exempts certain articles brought in by schools and seminaries. Section 6, Act of May 22, 1824, and Section 3, Act of March 3, 1857, made similar exceptions in favor of schools. Act of July 24, 1897, and Act of August 5, 1909, admitted books, etc., free for schools and seminaries.

On July 25, 1861, Congress directed a refund of duties paid by the states on fire arms imported. S. L. Vol. 12, Chap. 18; Chap. 1, Vol. 12, S. L., p. 255; S. L. Vol. 12, Chap. LI.

In 1899 certain bells for the Iowa Agricultural College at Ames, presented by Edwin M. Stanton, were admitted free. 30 Stat. at large 837, Chap. 157.

It has not been uncommon—prior to 1922—to admit articles for use at State Fairs free. One illustration appears in 31 Stat. at Large 1462, No. 11 Joint Res., February 28, 1901, in behalf of the State of Texas.

The plain fact is that little reason existed for challenging customs duties on behalf of the states until the illiberal—from the standpoint of scientific research—Tariff Act of 1922 was enacted.

The Estoppel Doctrine

We do not know how otherwise to describe the novel argument on page 36 of Defendant's brief than as the "estoppel doctrine." The Solicitor General did not urge it in the oral argument and we infer he does not regard it seriously. No such condition, as this theory implies, is attached in any congressional grant to the gift of lands or money to the states, and from the acceptance of such a gift no waiver of sovereign immunity can be implied. If the argument had any merit, we would have to have a balance struck in every case before this Court could determine whether this constitutional immunity was lost and the power to control schools, health, highways, etc., had passed from the states to the United States in the numerous cases of Federal subsidy.

Bankruptcy

We think the analogy supposed to be furnished by the Bankruptcy Act, and decisions under it, affords no assistance to the Government in this case. We are not aware that this Court has ever decided the question whether Congress has the constitutional power to enact a law discharging an insolvent debtor from his obligation to pay a state tax. Under the present statute this question cannot arise. 30 Stat. at Large 550, Act of

July 1, 1899, C. 541, Section 17. The question of priority between the nation and the states turns on different principles. The power of taxation is concurrent in state and nation and the state power to tax must yield when it comes in conflict with the national power to tax, unless there be an express or implied limitation in the Constitution to the contrary.

The Home Market

The evidence shows without dispute that the equipment imported was not obtainable in the home market. This may be an incident from the technical legal standpoint; nevertheless, when, as has been urged in this case, the purpose of Congress to equalize competition is invoked in behalf of the Government and it is indicated that that purpose is frustrated by the constitutional exemption claimed, it seems entirely proper to advert to this fact. It does not appear to us to be a far fetched argument to urge that the power to regulate foreign commerce does not imply the power to destroy that commerce in legitimate commodities for strictly state use when such stoppage is purely arbitrary and, upon conceded facts, obviously has no connection with the expressed purpose of Congress to encourage domestic industry. In such circumstances the power exerted ap-

pears to us to be arbitrary and the result of the exertion thereof is, as pointed out in the oral argument, to stay the progress of research and to delay, perhaps check entirely, important discoveries which, in the history of our industrial development, always have preceded legitimate commercial exploitation. The researcher must formulate his hypothesis; he must test it; in order to test it he requires instruments frequently which must be made to specification and are often non-existent in commerce. Industries, organized on the basis of profit making, are not prepared to furnish equipment of this kind or to bother with making it. In consequence, scientific institutions must either go without or pay a 45% or a 65% tax to the Government. This, of course, means that the scientific apparatus can not in many cases be obtained.

Such an argument is one properly addressed to Congress. When, however, two interpretations are urged upon the Court, it is entirely proper to call attention to the natural consequence resulting from the adoption of the one or the other construction.

Confusion of Commerce and Taxing Powers

It appears to us that there is in the opinions of the majority below and in the argument for the United

States, a confusion of thought in a matter essential to a sound conclusion. There are numberless regulations of foreign commerce which are achieved through the exertion of that specific grant; there are likewise numerous and important regulations of commerce which come about indirectly through the exertion of the specifically granted power to tax; and there is still another type of regulation of commerce accomplished through the exercise of other granted powers, such as the war power, the treaty making power, etc. The system of protection of home industry by means of tariff duties is fundamentally nothing more than the selection of the objects—articles—of taxation, with amounts of duties and selection so arranged as, at the same time, to benefit domestic industry by equalizing the competition of articles produced abroad at lower cost. Congress, having full power to select the objects of the tax, has the discretion to make the choice on any basis it sees fit. Congress may thus, in fact, use the taxing power as a means of effectually regulating foreign commerce, but the power exerted still is the power to tax. This is exactly what Taft, C. J., means in Hampton Co. v. United States, 276 U. S. 394, and Marshall, C. J., in Gibbons v. Ogden, 9 Wheat. 1. The motives which impel exercise of a power can not override the constitu-

tional purpose of the act. Ellis v. United States, 206 U. S. 246, Stephenson v. Binford 53 Supreme Court Rep. 18 (December 1932).

Counsel and the majority of the lower court overlook or ignore:

1. That the implied limitation (Petitioner's Brief, pages 16-18) is "Derived from the constitution in the same sense and upon the same principles that it would be if expressed in so many words" (Clallam County v. United States Spruce Corporation, 263 U. S. 341, 344); that is, to all intents and purposes, it is an *express limitation*;

2. That the paragraphs, the application of which is challenged in this case (Petitioner's Brief, pp. 32-33), are in fact, intent, and upon their face, purely tax provisions and cannot be regarded as regulations of commerce otherwise than indirectly and incidentally in the constitutional sense (R. pp. 108-111);

3. That there are numerous provisions in the Tariff Act of 1922 which are purely regulations of Commerce and, therefore, support the statement of purpose in the title to that effect;

4. That this Court, in Hampton Company v. United States, 276 U. S. 394, Petitioner's Brief, pp. 18-20, holds

that the Tariff Act of 1922 is a revenue measure in the constitutional sense. Indeed, the opinion in that case seems to us wholly predicated on the conclusion that the law is a "revenue act" (Petitioner's Brief, p. 19, R. p. 106);

5. That the "commerce" which Congress may regulate was historically not supposed to embrace the isolated transactions where individual states acquired property for strictly governmental use, but was supposed to be "limited to . . . . commerce . . . . between citizens of the United States and citizens and subjects of foreign nations . . . . ." United States v. Steffens, 100 U. S. 82, 96, in which the quoted language is copied verbatim, but without citation, from United States v. Holliday, 3 Wall. 407 (1865);

6. That Buttfield v. Stranahan, 192 U. S. 470, Brolan v. United States 236 U. S. 216, Weber v. Freed 239 U. S. 325, etc. (Government Brief, pp. 11-12), are not controlling concerning the power of Congress under the *commerce clause* to exclude commodities, concededly harmless, from foreign commerce—a question not involved in this case—although Chief Justice White used some sweeping language, possibly going to the extreme verge of what the factual situation or the question be-

fore the Court strictly required, because they are "police power" cases (Brooks v. United States 267 U. S. 432, 436), dealing with commodities in themselves possibly harmful or dangerous (i.e., sponges, opium, oysters, etc.). In Hammer v. Dagenhart, 247 U. S. 251 this Court says that "the cases demonstrate the contrary" of the proposition that Congress, under the *commerce* clause, may prohibit the movement of "ordinary commodities" in commerce. We think this question is not here. See Brief for Petitioner, pp. 21-23, also Petitioner's Brief in support of petition for certiorari, pp. 14-15.

7. That Veazie Bank v. Fenno and Head Money cases (Brief for the United States, p. 15, 28) and United States v. Turner (Brief for the United States, p. 29) support the Petitioner's position concerning the essential distinction between the power to tax and that to regulate commerce.

Congress has occasionally levied exactions, in form taxes, which have been sustained against attack as suitable and proper means for the effective execution of express powers. Of this type was the per capita tax sustained in the Head Money Cases, 112 U. S. 580, which was a genuine regulation of commerce in the form of a tax, and Veazie Bank v. Fenno, 8 Wall. 533,

where a tax of 10% on the circulation of State Banks was, in primary purpose and effect, a regulation of the currency, although in form a tax. In each of these cases the taxing power was not exerted, but another and express power to the efficient exertion of which means were deemed appropriate which in appearance but not in essential character in a constitutional sense, suggested the exercise of the power to tax. On a somewhat similar principle, it has not been uncommon for the States to levy a stated tax on oil and gasoline brought into the State, but in such a manner that under the local constitution it would be invalid as an exercise of the State's taxing power. The exaction has been sustained on the theory that, notwithstanding the name used, the tax was imposed in the valid exercise of the State's police power.

Is it to be implied that the states, in surrendering control over foreign commerce to the new government, intended also by that clause to extend the power to tax, granted in other parts of the instrument and subject to clear limitations, both express and implied, so as to empower Congress to tax property acquired abroad by the states for the sole purpose of carrying on a strictly governmental activity? The tariff act is ostensibly enacted pursuant to the clause giving Congress power to

levy taxes, and not pursuant to the commerce power. Hampton Company v. United States, supra, Gibbons v. Ogden, supra, State Tonnage Tax Cases, 12 Wall. 204.

Assume this Court finds, contrary to the conclusion in Hampton Company v. United States, that the Tariff Act of 1922 was *ostensibly* enacted under the power to regulate commerce; yet, if, in reality, the exaction challenged be "not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within the power reserved to the states," the exaction should be condemned. Linder v. United States, 268 U. S. 15, and numerous other decisions of this Court.

Whatever regulatory purpose Congress may have had in view in enacting the four paragraphs challenged in this case (Petitioner's Brief, pp. 32-33), "must be reached only through a revenue measure and within the limits of a revenue measure." United States v. Jin Fuey Moy 241 U. S. 394, 402, quoted in Linder v. United States supra, p. 17.

The customs duty is obviously not laid for a regulative purpose, under the commerce clause, so that it can be regarded as a tax in form only. If the duty collected and here protested were held to be a purely regulatory

measure, though in form a tax, the result would be that tariff acts could with equal propriety originate in the Senate, thereby reversing the practice of one hundred forty years, and the duties need not be uniform (Petitioner's Brief, p. 20).

No Power to Tax under Commerce Clause

It seems to us inescapable that if the paragraphs challenged are sustained as commerce regulations, applicable to the Petitioner, Congress may levy a tax on exports in spite of the prohibition of the Constitution. The implied limitation upon the power of Congress to tax state instrumentalities has been said by this Court to be "derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words," Clallam County v. United States, etc., 263 U. S. 341, 344. That is, to all intents and purposes, it is as effective as if it were an express reservation of power. Therefore, if Congress enacts a law entitled "An Act to Regulate Foreign Commerce," and imposes a duty on all exports and seeks to escape the effect of the prohibition and the decisions of the Court by claiming that it is exercising the power over commerce, on the theory of the Government in this case the tax on exports would have to be sustained as an exertion of the power

to regulate foreign commerce. Of course, this Court would not be bound by the name Congress might give its purpose; it would not permit Congress thus to evade what was one of the objectives of the Constitution, namely, to prevent the taxation of exports from the states. Yet, it seems to us that a tax on exports could be sustained under the commerce clause if a tax on imports, may, as here claimed, be sustained thereunder.

An Act of Congress may, and often does, contain provisions sustainable only by reference to two or more divergent sections of the Constitution. It is our contention that the Tariff Act of 1922 illustrates this proposition. Some parts are enacted under the power to regulate commerce; others under the power to tax; and still others under the commerce and perhaps the treaty making power. A notable illustration is the Sherman Anti-Trust Law, especially Sections 1 and 3. In Atlantic Cleaners and Dyers v. United States, 52 Supreme Court p. 607, 609, it is pointed out that Section 1 is enacted under and limited by the scope of the commerce clause; while Section 3 is sustainable only by reference to the express power to legislate for the District of Columbia. This recent decision supports by analogy our contention that the portions of the act here challenged

must be limited by and must derive their vitality from the grant of the power to levy import duties—to tax.

Power to Exclude Commodities from Foreign Commerce

In the case at bar it is not claimed by any one that the tax challenged can be sustained under any other power other than that over commerce or over taxation. That is, there is no contention that the tax challenged can be upheld as an exercise of the war power, the treaty making power, the power to deal with foreign nations, or of a totality of these or other powers.

While we have consistently maintained that there is no question in the case concerning the extent of the power of Congress, under the commerce clause, to exclude commodities from foreign commerce, we deem ourselves forced to notice the position taken by the Government on this point. The question is interesting, if not pertinent; and we respectfully suggest that it is not so one-sided as the Government or amici curiae seem to regard it.

The leading recent case on the power of Congress over interstate commerce is Hammer v. Dagenhart, 247 U. S. 251. As the petitioner interprets this decision, the doctrine is definitely established that Congress has no

power to exclude a commodity from interstate commerce without regard to the intrinsic character of the commodity or of the circumstances of use or production. Such an exercise of power this Court, it now seems, will not sustain unless and until it is prepared to hold that the right to engage in interstate commerce owes its existence to the Constitution or to Federal law, and it is not merely a right preserved by the Constitution against interference or control by the States. It seems, however, that this Court cannot arrive at such a conclusion without holding that the system of interstate transportation is an instrumentality of the National Government in substantially the same sense as the National banks and the postal system. Speaking always with reference to the commerce clause, the same observations would seem to apply to foreign commerce.

Before the Constitution, interstate and foreign commerce were equally free from control by any agency other than the individual states. The right of a state to buy and import merchandise from abroad for use in the performance of strictly governmental functions existed and was exercised long before 1789. This right of importation is, therefore, in no sense a creature of the Constitution or of Federal laws. The Constitution or con-

stitutional legislation may have restricted that pre-existing rignt, but neither created or augmented it.

The power to regulate commerce, under Section 8, Article II, paragraph 3, was given Congress "to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture," said this Court in Hammer v. Dagenhart. We think that this language should be applied to the power over foreign commerce, granted in the same clause, and that it is not the intent of the Constitution that this power may be so exerted as to control the States in their exercise of governmental functions by forcing them to purchase their governmental instrumentalities in the markets of some state or states, or go without as in the case at bar, or else pay an extravagantly large and onerous tax to the National Government. We suggest, on this point, that the language of Chief Justice Marshall is entirely pat when he said, in Sturgis v. Crowninshield, 4 Wheat 122, that the powers not granted proceed "not from the people of America, but from the people of the several states; and remain, after the adoption of the Constitution, what they were before except as far as they may be abridged by that instrument." The pre-existing right of a state

to import, as stated, was not abridged by a gift to Congress of a power *under the commerce clause* to tax the property imported when directly associated with the performance of a strictly governmental function. The purpose was to free commerce, not to transfer to the new government the powers of restriction or prohibition theretofore exercised by some states to the annoyance of others.

Brief of Amici Curiae

No attempt is made in the brief of Amici Curiae to discriminate concerning the real and rather narrow issue in this case and the circumstances in which Congress may, under the commerce power and other powers in conjunction with it, prohibit importation. Amici Curiae ignore the fact that Congress does not prohibit but taxes in the paragraphs challenged. No new arguments are advanced and our discussion of the position of the Government is equally applicable here.

We are impressed by the concluding paragraph of the brief of Amici Curiae, and we are reminded of the spirit of the delegates from the states of Pennsylvania and New Jersey in the Constitutional Convention of 1787. We suggest that roads are also built in New York, in Illinois, in California, in Iowa, and in all the twelve states which have supported Illinois in this struggle to

free scientific research and progress from the bonds of unenlightened selfishness. These last named states understand that the spirit of research goes far in advance of the procession of profitable business progress and do not anticipate ruin to any one through the importation of scientific instruments or of "road-building materials" by the states; and we are persuaded that their legal representatives are as conscientious as we should presume public servants to be. Of them we feel confident it could not be either facetiously or seriously said: "The voice is Jacob's voice, but the hands are the hands of Esau."

Respectfully submitted,

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Since printing the main brief, the following Attorneys General have signified their concurrence in the legal position taken by Illinois in this contest, in addition to those whose names appear on the main brief.

U. S. WEBB, California
GREEK L. RICE, Mississippi
RAYMOND NAGLE, Montana
PAUL F. GOOD, Nebraska
EDWARD L. O'CONNOR, Iowa

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 538

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, petitioner

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Customs Court (R. 87–97) are reported in 59 Treas. Dec. 747 (T. D. 44758). The opinions of the Court of Customs and Patent Appeals (R. 98–148) are reported in 62 Treas. Dec., No. 26, p. 68 (T .D. 45773).

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered June 20, 1932. (R. 148–149.) A petition for rehearing was denied October 10, 1932. (R. 149–150.) The petition for a writ of certiorari was filed December 6, 1932. The jurisdiction of this Court is invoked under Section

195 of the Judicial Code as amended by Section 647 of the Tariff Act of 1930, c. 497, 46 Stat. 590, 762 (U. S. C. Sup. V, Title 28, Sec. 308).[1]

QUESTIONS PRESENTED

1. Whether the University of Illinois is an instrumentality of the State of Illinois engaged in a governmental function.

2. If the University of Illinois is such an instrumentality, whether it may recover the amount of customs duties paid on articles imported by it, on the ground that the exaction of the duties is prohibited by the Constitution.

STATEMENT

In 1927 and 1928, the petitioner purchased in Germany and imported into this country certain property, upon which the Collector of Customs assessed duties. (R. 32–33; 35–36; 37–38; 40–41.) The property consisted of chemical glassware, an electric machine and parts, an optical instrument, and certain scientific apparatus.

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[1] Since the importations involved in this case were made in 1927, the amendment to Section 195 of the Judicial Code made by the Tariff Act of 1930 is apparently inapplicable. See the brief of the United States in *Lamont, Corliss & Co.* v. *United States*, No. 113, October Term, 1931, certiorari denied, 284 U. S. 622. The Attorney General filed no certificate of importance in this case, but such a certificate is not essential to this Court's jurisdiction even if the Tariff Act of 1930 is inapplicable, since the case is apparently one "in which there is drawn in question the construction of the Constitution of the United States."

The petitioner paid the duties assessed, and filed protests with the Collector of Customs. After a hearing, the Customs Court overruled the protests and entered judgment for the Government. (R. 97.) On appeal to the Court of Customs and Patent Appeals, that court, with two judges dissenting, affirmed the judgment of the Customs Court. (R. 148–149.)

DISCUSSION

The contention that the Federal Government may not impose customs duties upon property imported by a State university raises a question of constitutional law both novel and important. Immunity of a State or its instrumentalities from the imposition of customs duties apparently has not been asserted in any judicial proceeding other than the instant case. The interest of the State of Illinois in this proceeding is evidenced by the fact that the Attorney General of the State has joined in the pending petition for certiorari. Because of the importance of the constitutional question involved and the interest of a sovereign State therein, we do not oppose the granting of the writ.

Respectfully submitted.

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CHARLES D. LAWRENCE,
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ERWIN N. GRISWOLD,
Attorney.

DECEMBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 538

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, petitioner

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Customs Court (R. 51–61) are reported in 59 Treas. Dec. 747 (T. D. 44758). The opinions of the Court of Customs and Patent Appeals (R. 63–113) are reported in 61 Treas. Dec. 1334 (T. D. 45773).

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered June 20, 1932. (R. 113–114.) A petition for rehearing was denied October 10, 1932. (R. 114–115.) A petition for a writ of

certiorari was filed December 6, 1932, and was granted January 9, 1933. (R. 117.) The jurisdiction of this Court rests on Section 195 of the Judicial Code as amended by Section 647 of the Tariff Act of 1930, c. 497, 46 Stat. 590, 762 (U. S. C. Sup. VI, Title 28, Sec. 308).

QUESTIONS PRESENTED

1. Whether, in importing merchandise from abroad, the University of Illinois is an instrumentality of the State of Illinois engaged in a governmental function.

2. If the University of Illinois is such an instrumentality, whether it may recover the amount of customs duties paid on the articles imported by it, on the ground that the exaction of the duties is prohibited by the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in Appendix A, *infra,* pp. 38–40.

STATEMENT

In 1927 and 1928 the petitioner purchased certain property in Germany, Great Britain, and Holland and imported it into this country. The property consisted of chemical glassware, an electric machine and parts, an optical instrument, and certain other scientific apparatus. (R. 15, 17, 19, 21–22.)

The Collector of Customs assessed duties upon the property so imported at the rate prescribed by the Tariff Act of 1922. The petitioner paid the duties assessed, and filed protests with the Collector of Customs. After a hearing, the Customs Court overruled the protests and entered judgment for the Government. (R. 61.) On appeal to the Court of Customs and Patent Appeals, that court, with two judges dissenting, affirmed the judgment of the Customs Court. (R. 113–114.)

Certain additional facts relating to the status of the University of Illinois appear in the Argument.

SUMMARY OF ARGUMENT

I

The power of Congress over foreign commerce is not subject to any implied exception in favor of the States, and includes the unqualified power to impose a protective tariff. There is no express provision of the Constitution upon which the petitioner may rely in support of its contention that an instrumentality of the State may import merchandise from abroad without the payment of customs duties. If such an exemption exists, it must be implied.

The Constitution expressly confers upon Congress the power to "regulate Commerce with foreign Nations." It is, of course, a matter of history that one of the purposes sought to be achieved through the Constitution was the establishment of

a single authority with untrammeled and exclusive power over the regulation of foreign commerce. This Court has held in a long line of decisions that the power of Congress over foreign commerce is without restriction. In *Buttfield* v. *Stranahan,* 192 U. S. 470, 493, this Court said the power was "exclusive and absolute."

Congress may exercise this plenary power over foreign commerce for the purpose of protecting American industries; and this purpose it may accomplish through the levying of duties in a tariff. The power of Congress to regulate foreign commerce through a protective tariff was sustained in *Hampton & Co.* v. *United States,* 276 U. S. 394.

It can not be denied that the Tariff Act of 1922 involves an exercise by Congress of this power to regulate foreign commerce. The fact that the regulation takes the form of a duty and thus operates to raise revenue does not negative the fact that it is also a regulation of commerce and may be sustained as such. That the regulation is valid although it takes the form of a tax seems necessarily to follow from the decisions holding that the power to regulate foreign commerce includes the power to prohibit the importation of any article.

Even if the exaction in this case could not so clearly be sustained as a regulation of foreign commerce, it would not necessarily follow that it was unconstitutional. The present case involves not an internal matter over which concurrent power has

been given and reserved, but the matter of duties on imports. The Constitution not only expressly gives Congress power to collect such duties, but it expressly denies the power to the States. When the States ratified the Constitution, therefore, they expressly surrendered to the general Government all power which they formerly had in this field.

II

The power of Congress to regulate foreign commerce has for many years been exercised by the imposition of duties on articles imported by States and their instrumentalities. The practical construction of the Constitution on this question is clear and convincing. It is apparent from Acts of Congress, decisions of courts, decisions of the Board of General Appraisers, rulings of the Treasury Department, and the long continued acquiescence in the collection of duties on the part of the State officials.

It has been the uniform practice of the Treasury Department for a great many years not to exempt imports by States or State instrumentalities if they were otherwise taxable under the Tariff Acts. There are many published Treasury rulings in which property imported by a State or by an instrumentality of the State has been held dutiable. In other Treasury rulings such imports have been held entitled to free entry, but the claim for free entry was based on a construction of the statute

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and not on constitutional grounds. These rulings are set forth in Appendix C (*infra*, pp. 47–67). They began as early as 1875 and have continued without interruption until the present time. The earliest reference in the records of the Treasury Department to a claim of constitutional exemption appears in 1924. Thus, for 135 years after the adoption of the Constitution, the officials of the States did not question the constitutional power of Congress to impose duties on their imports. This uniform and long continued practical construction of the Constitution is of great weight in its interpretation.

III

The power of Congress to regulate foreign commerce is conferred by the Constitution without qualification. Our argument that no exception is to be implied in behalf of the States is supported by decisions with respect to other powers granted to Congress in the Constitution.

The closest analogy to the power to regulate foreign commerce is, of course, the power to regulate interstate commerce. It seems to be well settled that a State engaging in interstate commerce is not exempt from the regulatory power of Congress. There are several decisions in the lower Federal courts in which it has expressly been held that a State or municipally-owned railroad is subject to Federal regulation. Equally significant is the fact

that State or municipally-owned railroads have often submitted to the jurisdiction of the Interstate Commerce Commission without question.

Another analogy is to be found in the power given to Congress to make "uniform Laws on the subject of Bankruptcies." There is no constitutional exception in favor of the States with respect to this power. The bankruptcy laws apply to the claims of a State. It has apparently never been contended that Congress has no power under the Constitution to effect such claims through the power to enact bankruptcy laws.

IV

In *South Carolina* v. *United States,* 199 U. S. 437, this Court held that the Constitution did not prevent the United States from imposing a license tax on the sale of liquor by the State of South Carolina. The reasoning upon which this decision was based is largely applicable here. The Court in its opinion specifically referred to the question of import duties, and called attention to the fact that if a State were exempt from the payment of these duties "it could undersell all individuals and so monopolize the importation and sale of foreign goods."

The States are already large purchasers of materials and merchandise. If a State may import foodstuff for its penitentiaries and other institutions, supplies of all kinds for its libraries and uni-

versities, brick and cement and building materials for its highways and public buildings, it is obvious that the effect on domestic producers and on the national revenues will be serious.

Even if it be conceded that education is a governmental function, it by no means follows that university education must be so regarded. In maintaining a university the State enters into competition with similar institutions conducted privately. It does not clearly appear that the University of Illinois is a strictly governmental function of the State of the same class as the maintenance of its courts, penitentiaries, police departments, fire departments, and similar activities which can be carried on solely by the State or one of its political subdivisions.

Moreover, the University of Illinois since its creation has received large sums of money from the Federal Treasury at various times. The duties involved in this case aggregate about one-fifth of one per cent of the amount received by the University from the United States during the two years when the goods in question were imported. The University is in no position to contend that it is being burdened by the Federal Government as long as the contributions received by it from the United States exceed the duties imposed.

ARGUMENT

I

THE POWER OF CONGRESS OVER FOREIGN COMMERCE IS NOT SUBJECT TO ANY IMPLIED LIMITATION IN FAVOR OF THE STATES. IT INCLUDES THE POWER TO IMPOSE A PROTECTIVE TARIFF, AND THE STATES ARE NOT EXEMPT FROM THE PAYMENT OF DUTIES UNLESS CONGRESS SO DECLARES

There is no language in the Constitution to support the contention that an agency or instrumentality of a State may import merchandise from abroad free of duty imposed by Federal statute. Such exemption, if it exists at all, must exist by implication. This Court has never recognized any such implied immunity, and we contend that the Constitution itself precludes any such implication because of its grant to Congress of paramount and plenary control over foreign commerce.

The third paragraph of Section 8 of Article I of the Constitution (*infra*, p. 38) provides that Congress shall have power—

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

It is, of course, a matter of history that this grant of power to the Federal Government was one of the great purposes sought to be achieved by the adoption of the Constitution. It was quite obviously necessary to establish a single authority with untrammeled and exclusive power over the regulation of foreign commerce. This was clearly recognized in the Constitutional Convention and in

the contemporaneous discussion of the proposed Constitution. (Appendix B, *infra,* pp. 41–46.)

This Court at an early date in *Gibbons* v. *Ogden,* 9 Wheat. 1, considered the commerce clause of the Constitution, and that case is the beginning of a long line of decisions holding that the power of Congress over foreign commerce is without restriction. In *Gibbons* v. *Ogden* this Court, through Chief Justice Marshall, said (p. 193) that—

> these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend.

The power to regulate foreign commerce, the Chief Justice said (pp. 196–197)—

> is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.

Although later decisions have shown that the power of Congress over interstate commerce is subject to some limitations (see *Hammer* v. *Dagenhart*, 247 U. S. 251), these limitations do not extend to the power to regulate commerce with foreign nations and with the Indian tribes. This has been conceded even by those who sought to impose restrictions on the power to regulate interstate commerce. See Fuller, C. J., dissenting in the *Lottery Case*, 188 U. S. 321, 374. In *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188, 194, this Court said that—

> Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—a power as broad and as free from restrictions as that to regulate commerce with foreign nations.

The unqualified nature of the power of Congress over foreign commerce was made the basis of the decision in *Buttfield* v. *Stranahan*, 192 U. S. 470. The Court said (pp. 492–493):

> Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo

> statutes, but indirectly as a necessary result of provisions contained in tariff legislation. * * *
>
> The power to regulate foreign commerce is certainly as efficacious as that to regulate commerce with the Indian tribes. And this last power was referred to in *United States* v. *43 Gallons of Whiskey,* 93 U. S. 188, 194, as exclusive and absolute, * * *.
>
> As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised.

Other decisions to the same effect are *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320, 334; *The Abby Dodge,* 223 U. S. 166, 176. *Brolan* v. *United States,* 236 U. S. 216, 218; *Weber* v. *Freed,* 239 U. S. 325, 329. Cf. *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 434.

Congress may exercise this plenary power over foreign commerce for the encouragement and protection of American industries, and this purpose may be accomplished by levying duties upon the products of foreign countries not for the sake of revenue but to exclude from our markets the competition of foreign goods. *Hampton & Co.* v. *United States,* 276 U. S. 394, 411. Cf. *Alaska Fish*

Co. v. *Smith,* 255 U. S. 44, 48. In the second statute enacted by the First Congress of the United States (Act of July 4, 1789, c. 2, 1 Stat. 24), duties were laid upon imports "for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures." Duties levied for protection were thus approved by a Congress which included in its membership many of the members of the Constitutional Convention. See also the letter of James Madison, *infra,* p. 42. The constitutionality of a protective tariff was not raised in Congress until the debate on the high tariff of 1824. 1 Stanwood, *American Tariff Controversies,* 293–294. The proponents of the tariff founded their arguments on the power to regulate foreign commerce.[1] The power of Congress thus to exercise its power to regulate foreign commerce was supported by many eminent authorities.[2] Although

[1] In reply to Mr. Barbour of Virginia (afterwards Mr. Justice Barbour), Mr. Clay said (Annals of Congress, March 31, 1824, p. 1994):

"The gentleman from Virginia has, however, entirely mistaken the clause of the Constitution on which we rely. It is that which gives to Congress the power to regulate commerce with foreign nations. The grant is plenary, without any limitation whatever, and includes the whole power of regulation, of which the subject to be regulated is susceptible."

[2] See 2 Story, Commentaries on the Constitution, Secs. 1077–1095, and the material collected at pp. 138–153 of the brief for the United States in *United States* v. *Realty Company,* 163 U. S. 427, Nos. 869, 870, October Term, 1895. See also 1 Stanwood, *American Tariff Controversies,* c. IX;

the power was questioned for some time, it has now "passed beyond the range of controversy." 2 Willoughby, *Constitutional Law,* 680.

It can not be denied that the Tariff Act of 1922, under which the duties in question were imposed, involves an exercise by Congress of its power to regulate foreign commerce, and specifically of its power so to regulate foreign commerce as to encourage American industries. The statute is designated in its title as "An Act To provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes." The grant of power to Congress to impose a protective tariff would be largely futile if the States might import from abroad as they chose without regard to the regulation imposed on foreign commerce by the will of Congress. To apply the argument specifically, if Congress chooses to encourage the production in America of scientific apparatus and scientific glassware of the type used in universities, by imposing protective duties upon such imports, its purpose will be frustrated if the States may import such things free of duty. *South Carolina* v. *United States,* 199 U. S. 437, 455.

The fact that the regulation lays a charge as upon imported merchandise and thus results in revenue does not negative the fact that it is a regulation of commerce and must be treated as an exer-

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Winston, *The Tariff and the Constitution*, 5 Journal of Political Economy 40; Cahill, Curtis and Backworth, *Is a Protective Tariff Constitutional?*, 1 Mich. L. J. 348.

cise of the power to regulate.[3] It is established by *Veazie Bank* v. *Fenno,* 8 Wall. 533, that regulation may take the form of taxation. In that case one of the grounds on which a tax on the issue of State bank notes was sustained was the power of Congress to protect the national currency. See also *Head Money Cases,* 112 U. S. 580, 595–596.

That the regulation is valid although it takes the form of a tax seems necessarily to follow from the decisions holding that the power to regulate foreign commerce includes the power to prohibit the importation of any article. *Buttfield* v. *Stranahan,* 192 U. S. 470; *Brolan* v. *United States,* 236 U. S. 216; *Weber* v. *Freed,* 239 U. S. 325. At an early date, the power of Congress to regulate foreign commerce was exercised by a complete embargo on all foreign commerce. Act of December 22, 1807, c. 5, 2 Stat. 451, as supplemented by the Act of January 9, 1808, c. 8, 2 Stat. 453. This statute was assailed on the ground that the power to regulate foreign commerce did not include the power to prohibit it; but the statute was sustained in *United*

[3] See 2 Story, Commentaries on the Constitution, Secs. 1080, 1081, 1088. In Section 1088, Mr. Justice Story wrote, in connection with this question, that "revenue is an incident to such an exercise of the power. It flows from, and does not create the power. It may constitute the motive for the exercise of the power, just as any other case may; as, for instance, the prohibition of foreign trade, or the retaliation of foreign monopoly; but it does not constitute the power."

States v. *The Brig William,* 2 Hall Law J. 255, Fed. Cas. No. 16700 (D. Mass.). See 2 Story, Commentaries on the Constitution, Secs. 1290, 1292; 1 Kent, Commentaries, 431–432. This power has been exercised in many subsequent Acts of Congress, including Sections 305, 306, and 307 of the Tariff Act of 1922. It could scarcely be contended that a State remained free under the Constitution to import articles from abroad against which Congress had placed a specific embargo or prohibition. This Court has held that the power of Congress over foreign commerce is "exclusive and absolute." *Buttfield* v. *Stranahan,* 192 U. S. 470, 493. Since Congress may forbid the importation entirely as a regulation of commerce, it may likewise regulate commerce by allowing the importation subject to a duty. It has already been shown that a regulation of commerce is no less a regulation because it takes the form of a duty. The power to destroy includes the power to tax.

The general rule of concurrent immunity from taxation established by such cases as *McCulloch* v. *Maryland,* 4 Wheat. 316, and *Collector* v. *Day,* 11 Wall. 113, arises from the implied limitation upon the power of either the States or the Nation to impose the burden of taxation upon the exercise of sovereign powers reserved to the States or

granted to the United States by the Constitution. But the States reserved no power with reference to the importation of merchandise, and none may be implied in derogation of the constitutional power of Congress. The Constitution not only expressly gives to Congress the power to lay and collect duties and imposts (Article I, Sec. 8, par. 1; *infra*, p. 38) but the States are expressly forbidden to "lay any Imposts or Duties on Imports or Exports," with exceptions which are not material here (Article I, Sec. 10, par. 2; *infra*, p. 38). The Constitution itself thus makes plain the purpose to confer upon the Federal Government the exclusive and plenary power to lay and collect duties on imports. When the States ratified the Constitution they expressly surrendered to the general Government all power which they formerly had in this field, subject to a qualification which serves only to emphasize the completeness of the grant.

The tax involved in *McCulloch* v. *Maryland*, 4 Wheat. 316, was a discriminatory tax; it was levied only on banks not chartered by the State. There was only one bank which met this description, the Bank of the United States, which this Court held to be a Federal instrumentality. Obviously the unrestricted power to levy a discriminatory tax is the power to destroy. But the plenary power to regulate foreign commerce, including the power to prohibit as well as to tax, if exercised without

discrimination may not be challenged as destructive of the States and their instrumentalities of Government.

Further support for the correctness of these conclusions is found, we believe, in (1) the long continued practical construction of the Constitution with respect to the power of Congress to collect duties on State imports, (2) by the analogy of decisions under other clauses of the Constitution, and (3) by considerations derived from this Court's decisions in *South Carolina* v. *United States,* 199 U. S. 437.

II

PRACTICAL CONSTRUCTION

The power of Congress to regulate foreign commerce has for many years been exercised by the imposition of duties on articles imported by States and their instrumentalities. The practical construction of the Constitution on this question is clear and convincing. It is apparent from the Acts of Congress, the decisions of courts, decisions of the Board of General Appraisers (now the Customs Court), rulings of the Treasury Department, and the long continued acquiescence in the collection of duties on the part of State officials.

This Court recently decided that—

> practical construction, long continued, of the constiutional provisions * * * should be taken as fixing the meaning of those provisions, if otherwise doubtful.

McGrain v. *Daugherty*, 273 U. S. 135, 174. The same result has been reached in many other cases involving the construction of the Constitution. *Hampton & Co.* v. *United States*, 276 U. S. 394, 412; *Myers* v. *United States*, 272 U. S. 52, 175; *Knowlton* v. *Moore*, 178 U. S. 41, 92; *Ames* v. *Kansas*, 111 U. S. 449, 469; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 351; *Stuart* v. *Laird*, 1 Cranch 299, 309.

Statutes

The understanding of Congress that articles imported by a State were not constitutionally immune from customs duties seems evident from the provisions of paragraphs 1530 and 1706 of the Tariff Act of 1922 (*infra*, pp. 39–40). Paragraph 1530 provides that "any State or public library" may import books for its own use free of duty. Paragraph 1706 provides for the free importation of certain merchandise to be used "for exhibition at a fixed place by any State or by any society or institution established for the encouragement of the arts, science, agriculture, or education, or for a municipal corporation," and also for any like merchandise imported "by any society or association, or for a municipal corporation, for the purpose of erecting a public monument." If Congress had believed that importations by a State or municipality were constitutionally exempt from customs duty, the references to State libraries and to States and municipalities in these paragraphs of the statute would obviously have been useless.

Similar provisions are included in paragraphs 1631 and 1809 of the Tariff Act of 1930. In the library paragraph the reference to State libraries first appeared in paragraph 413 of the Act of August 27, 1894, although earlier Acts had exempted imports by educational institutions. The provision contained in paragraph 1706 of the Tariff Act of 1922 had its origin in paragraph 702 of the Act of July 24, 1897. Both paragraphs have been included in all subsequent Tariff Acts.[4]

Court Decisions

There are at least five court decisions, prior to the present case, involving duties on articles imported by or for a State instrumentality. In none of these cases was any question raised as to the constitutional power of the United States to impose the duties. The sole question in each case was one

[4] Scientific and philosophical apparatus and instruments were accorded free entry under Section 1 of the Act of August 10, 1790, c. 39, 1 Stat. 180, and remained on the free list until July 14, 1862, when they were made dutiable, at the rate of 10 per cent ad valorem. Under the Act of June 30, 1864, the rate on such merchandise was increased to 15 per cent. By the Act of July 14, 1870, such merchandise was returned to the free list when imported for use by an incorporated body for religious, philosophical, or educational purposes, and not for sale. This exemption was continued by the Acts of October 1, 1890, August 27, 1894, July 24, 1897, August 5, 1909, and October 3, 1913. The exemption was removed, however, by the Tariff Act of 1922, and by the Tariff Act of 1930, so that such merchandise is now made dutiable regardless of the purpose for which it is imported.

of the proper application of the statute. In *Little* v. *United States,* 104 Fed. 540 (C. C. D. Vt.), books imported for State law libraries in Maine were held entitled to free entry. In *University of Missouri* v. *United States,* reported only in a memorandum in T. D. 26641, 10 Treas. Dec. 135 (C. C. E. D. Mo., 1904), a decision of the Board of General Appraisers was reversed and certain articles imported by the University of Missouri were held to be free of duty as scientific apparatus. In *Eimer* v. *United States,* reported only in T. D. 27089, 11 Treas. Dec. 213 (C. C. S. D. N. Y., 1906), merchandise imported for the University of Wisconsin was held not entitled to free entry because of a failure to comply with the regulations. In *United States* v. *Wyman & Co.,* 2 Ct. Cust. App. 440, an iron cylinder containing acid, imported for the University of Kansas, was held free of duty since it was the ordinary covering of scientific material entitled to free entry. In *United States* v. *Kastor & Bros.,* 6 Ct. Cust. App. 52, scissors imported for use in domestic science classes in the New York City schools were held entitled to free entry as scientific apparatus. See also 21 Op. A. G. 301.

Departmental Practice

An examination of the practice of the Treasury Department shows that it has been the uniform practice for a great many years not to exempt imports by States or State instrumentalities if they were otherwise taxable under the Tariff Acts. The

Customs Regulations have never provided that imports by a State are immune from taxation, although these regulations have for many years included provisions allowing the entry of articles imported for the personal use of foreign ministers or ambassadors and of articles sent by a foreign government for its use to an agent in this country. See, for example, Articles 366 and 367 of the Customs Regulations for 1874. The Customs Regulations formerly made provision for free entry of articles imported for the use of the United States. This was in accord with requirements of the Tariff Acts through 1894. These provisions were omitted in the Tariff Act of 1897 and subsequent Acts, and articles imported by or for the United States are now subject to the payment of customs duties.

Although the earlier Customs Regulations contained no provision which stated in express terms that articles imported by a State would be subject to customs duties, Article 369 of the Customs Regulations of 1874 contained the following paragraph:

> Articles imported for the use of a person performing a public duty or service, although useful and appropriate to such service, cannot, if otherwise dutiable by law, be exempted from duty, unless it be shown that the article was ordered by an authorized agent of the Government, and is imported as the property of the United States.

There are numerous published Treasury rulings in which property imported by a State or by an instrumentality of a State has been held dutiable.

In other Treasury rulings such importations have been held entitled to free entry, but the claims for free entry were based on construction of the applicable statute and not on constitutional grounds. Many of these rulings are set forth in Appendix C (*infra*, pp. 47–67). They begin as early as 1875 and continue without interruption to the present time. Since *Collector* v. *Day*, 11 Wall. 113, was not decided until 1871, the question would hardly have arisen before that time.

No question concerning the constitutional power of the United States to tax imports by a State or an instrumentality of a State has been found in any published ruling or decision earlier than 1925, when the application of the University of Michigan for a refund of duties on the ground that the Constitution forbade their exaction was denied by the Board of General Appraisers. Abstract 50335, 48 Treas. Dec. 728. The earliest reference to the constitutional question which has been found in the unpublished correspondence of the Treasury Department is in a letter written by Assistant Secretary Moss to an Assistant Attorney General of Maryland on March 7, 1924. (*Infra*, pp. 62–63.) It thus appears that for 135 years after the adoption of the Constitution the officials of the States did not question the constitutional power of Congress to impose duties on their imports, and did not even think the matter doubtful enough to warrant an application to the Treasury for a ruling.

There has thus been a long-continued and uniform practical construction of the Constitution which should be of great weight in its interpretation.

III

ANALOGIES WITH OTHER POWERS GRANTED TO CONGRESS BY THE CONSTITUTION

The power of Congress to regulate foreign commerce is conferred by the Constitution without qualification. Our argument that no exception is to be implied in favor of the States is supported by decisions with respect to other powers granted to Congress in the Constitution.

Interstate Commerce

The closest analogy to the power to regulate foreign commerce is of course the power to regulate interstate commerce. Although the two powers are conferred in the same clause of the Constitution, the power over interstate commerce is subject to limitations which are not applicable to the regulation of foreign commerce. *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 434; *Brolan* v. *United States,* 236 U. S. 216, 222; *Buttfield* v. *Stranahan,* 192 U. S. 470, 492; Fuller, C. J., dissenting, in the *Lottery Case,* 188 U. S. 321, 374. Decisions sustaining the exercise by Congress of its power to regulate interstate commerce are therefore applicable *a fortiori* to the exercise by Congress of its power to regulate foreign commerce.

Although the matter has never been precisely determined by this Court, it seems to be well settled that a State engaging in interstate commerce is not exempt from the regulatory power of Congress. In *South Carolina* v. *United States,* 199 U. S. 437, 454, this Court referred to the possibility of public ownership of "the entire railroad system," and used this as a basis for its decisions that the States are not exempt from Federal taxation when they engage in proprietary activities. Similarly, in *Georgia v. Chattanooga,* 264 U. S. 472, 481, this Court referred to the State ownership of land in another State for railroad purposes as a "private undertaking."

There are several decisions in the lower Federal courts in which it has expressly been held that a State or municipally-owned railroad is subject to Federal regulation. In *McCallum* v. *United States,* 298 Fed. 373 (C. C. A. 9th), certiorari denied, 266 U. S. 606, it was held that the State Belt Railroad, a railroad engaged in interstate commerce in and around San Francisco, and owned and operated by the State of California, was subject to the provisions of the Federal Safety Appliance Act. The same result was reached in *Tilden* v. *United States,* 21 F. (2d) 967 (C. C. A. 9th). In *Mathewes* v. *Port Utilities Commission,* 32 F. (2d) 913 (E. D. S. C.), it was held that the Port Utilities Commission Railroad of Charleston, owned and operated by the city of Charleston, South Carolina, was subject to the provisions of the Federal Employers

Liability Act. Cf. *Sherman* v. *United States,* 282 U. S. 25.

Equally significant is the fact that State or municipally-owned railroads have often submitted to the jurisdiction of the Interstate Commerce Commission without question. In *Wharfage, Handling, and Storage Charges at Municipal Terminals, Norfolk, Va.,* 59 I. C. C. 488, it appeared that the city of Norfolk had filed with the Interstate Commerce Commission schedules of charges for services rendered at municipal terminals. These schedules were stricken from the Commission's files, not because of any immunity from regulation, but because the city was furnishing only a warehouse service which did not constitute interstate commerce. In *New Orleans Public Belt Railroad Construction,* 166 I. C. C. 761, the New Orleans Public Belt Railroad, owned by the city of New Orleans, applied for and obtained authority from the Commission to construct an extension of its line. The Commission referred to the railroad as "a carrier by railroad subject to the interstate commerce act." An application by the city of New Orleans for authority to issue bonds for the benefit of the same railroad was made and granted in *New Orleans Public Belt Railroad Bridge Bonds,* 189 I. C. C. 156. See also *California Canneries Co.* v. *Southern Pacific Co.,* 51 I. C. C. 500, 502–503.

Another example of this practical construction of the commerce clause appears in the Act of Feb-

ruary 17, 1917, c. 84, 39 Stat. 922 (U. S. C., Title 49, Sec. 53; *infra,* p. 39). This Act relates to the Cincinnati Southern Railroad, which is wholly owned by the city of Cincinnati. In 1881 the city leased the railroad to a company which is now a part of the Southern Railroad system. The lease contained a provision to the effect that the trustees of the Cincinnati Southern Railroad should be provided with annual free passes and be furnished with a car for the purpose of inspection. This provision of the lease was observed until 1912, when the Interstate Commerce Commission ruled (Conference Ruling No. 355, of April 8, 1912) that the trustees were in effect directors of a nonoperating company, and as such were not entitled to free transportation over the leased railroad.

The city of Cincinnati apparently made no suggestion that its railroad was not subject to the congressional power to regulate interstate commerce. It recognized the power of Congress and obtained the enactment of the Act of February 17, 1917, *supra,* allowing the issuance of passes to the trustees, officers, and agents of the Cincinnati Southern Railroad for use on business of the company. See House Report No. 973, 64th Cong., 1st Sess.; Senate Report No. 1034, 64th Cong., 2d Sess.; 53 Cong. Rec., Part 13, pp. 13931–13932; 54 Cong. Rec., Part 3, p. 3063.

Other examples of the exercise by Congress of its paramount power under the commerce clause which necessarily interfere with the free activity

of the States readily suggest themselves. Would an officer of a State who transported lottery tickets in interstate commerce be immune from the provisions of Section 237 of the Criminal Code (U. S. C., Title 18, Sec. 387) on the ground that the constitutional power of Congress over interstate commerce is subject to an implied exemption in favor of a State which conducts its own lotteries?

Perhaps the most recent congressional regulation of interstate commerce which affects State activity is the Act of January 19, 1929, c. 79, 45 Stat. 1084 (U. S. C. Sup. VI, Title 49, Sec. 65) which divests convict-made goods of their interstate commerce character when transported into any State or Territory. Since convicts are necessarily State charges, this statute is obviously primarily a regulation of State activity. But no suggestion seems ever to have been made that the statute is unconstitutional. See Senate Report No. 344, 70th Cong., 1st Sess.; House Report No. 897, 70th Cong., 1st Sess.

Immigration of Aliens

Another analogy is found in the power of Congress with respect to aliens. It is, of course, well settled that Congress may regulate or forbid the immigration of aliens. The immigration of aliens involves foreign commerce, and the power of Congress rests, at least in part, on its power to regulate foreign commerce. *Head Money Cases,* 112

U. S. 580, 591–594. *United States ex rel. Turner* v. *Williams,* 194 U.S. 279, 290. It could scarcely be contended that the power of Congress in this field is subject to an implied exception in favor of the States, and that a State might freely bring in aliens without regard to the laws of Congress, such, for instance, as that forbidding the immigration of contract labor. In fact, there are rulings on this precise question which have never been challenged. 26 Ops. A. G. 180; 26 Ops. A. G. 410; see 27 Ops. A. G. 479.

Bankruptcy

The Constitution gives Congress power to make "uniform Laws on the subject of Bankruptcies throughout the United States." If the power to regulate foreign commerce is subject to an implied exception in favor of the States, there would seem to be no reason why there should not be a similar exception with respect to the power of Congress over bankruptcy. But there is no such exception. The bankruptcy laws apply to the claims of a State. If a State claim for taxes is not filed within the time prescribed under the bankruptcy law it is barred. *People of the State of New York* v. *Irving Trust Co.,* No. 304, October Term, 1932, decided February 13, 1933.

Section 57 (j) of the Bankruptcy Act provides that debts owed to a State as a penalty or forfeiture shall not be allowed in bankruptcy, except for the

amount of the actual loss. This provision was applied against a State in *People of the State of New York* v. *Jersawit,* 263 U. S. 493. Other applications of the Bankruptcy Act against State claims may be found in *Commonwealth of Pennsylvania* v. *York Silk Mfg. Co.,* 192 Fed. 81 (C. C. A. 3d); *In re Abramson,* 210 Fed. 878 (C. C. A. 2d); *In re Brown,* 41 F. (2d) 228 (S. D. Ohio). Although it is sometimes said that the Bankruptcy Act should not be construed to apply against a State in the absence of a specific reference to State claims, it has apparently never been contended that Congress has no power under the Constitution to affect State claims through the power to enact bankruptcy laws. See also *Spokane County* v. *United States,* 279 U. S. 80, and *People of the State of New York* v. *Maclay,* No. 374, October Term, 1932, decided February 6, 1933, sustaining the power of Congress to require priority of payment of debts owing to the United States over debts due the States in the settlement of estates administered under insolvency laws of the States.

Another analogy is offered by the constitutional authority given Congress to grant patents and copyrights. This power, like the power to regulate foreign commerce, is one which is given exclusively to Congress and may not be exercised by the States. Although no decisions on the question are known, it could scarcely be contended that the power to grant patents and copyrights is subject to an implied constitutional exception in favor of the

States, and that a State might freely use a patented or copyrighted article.

IV

SOUTH CAROLINA *v.* UNITED STATES, 199 U. S. 437

In *South Carolina* v. *United States,* 199 U. S. 437, this Court held that the Constitution did not prevent the United States from imposing a license tax on the sale of liquor by the State of South Carolina. The reasoning upon which this decision was based seems directly applicable here. In its opinion this Court said (pp. 454–455, 457):

> The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. *Vance* v. *W. A. Vandercook Co., No. 1,* 170 U. S. 438. The profits from the business in the year 1901, as appears from the findings of fact, were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down.
>
> More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system. Would the State by taking into

possession these public utilities lose its republican form of government?

We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any State, how much would that State contribute to the revenue of the Nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations, as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.

Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the

> Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government. * * *
>
> * * * * *
>
> Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers in granting full power over license taxes to the National Government meant that that power should be complete, and never thought that the States by extending their functions could practically destroy it.

It is significant that the Court in its opinion specifically referred to the question of import duties and called attention to the fact that if a State were exempt from the payment of customs duties, "it could undersell all individuals and so monopolize the importation and sale of foreign goods." The question is directly involved in this case. If the States are entitled under an implied exemption in the Constitution to import free of duty any kind of merchandise used by them or by any of their agencies or instrumentalities, it is obvious that the national revenues would be threatened, and Federal control over foreign commerce would be weakened. Although there is not yet an approach to complete State socialism (cf. *Green* v. *Frazier,* 253 U. S. 233), the States are all large purchasers of materials and merchandise. These include foodstuffs for penitentiaries and other institutions,

supplies of all kinds for libraries and universities, brick and cement for public highways, and building materials for public buildings. If a State may import any of these articles free of duty, it is obvious that the effect on domestic producers and on the national revenues will be serious. That this danger is not purely imaginary, is evidenced by correspondence referred to in Appendix C (*infra*, pp. 57, 61–62) between the Governor of Louisiana and the Secretary of the Treasury in 1922, in which the Governor sought free entry of cement and other material for the construction of the Agricultural College of Louisiana, and for the construction of concrete bridges.

It is common knowledge that great quantities of food and clothing must be distributed in such times as these to relieve distress and that if other means fail Municipal and State agencies must administer such relief. It would be surprising to the members of Congress to learn that such agencies may import food and clothing free of duty for such purposes.

Even if it be conceded that education is a governmental function, it by no means follows that university education must be so regarded. It is clear that higher education was not a function of government in 1789 when the Constitution was adopted. At that time there were no State universities, and education beyond that of the most elementary sort

was wholly a private enterprise. If a State chooses to invade a field of endeavor long occupied by private individuals and private corporations, it may well be argued that such a step does not transform the State's activity into a governmental function. In maintaining a university, the State enters into competition with similar institutions conducted privately.

The University of Illinois does not derive its sole support from the State. It receives an income of over $800,000 a year from students as charges for tuition and laboratory fees. (R. 35–37.) These students come not only from the State of Illinois, but from nearly every State in the Union and from many foreign countries. (R. 37.) It can hardly be said to be a governmental function of the State of Illinois to educate students from other States and other countries.

Many of the activities of the University of Illinois are in direct competition with private enterprise. One of its divisions is the University of Illinois Press, which prints, publishes, and sells books to the public in the same manner as a private publishing house.

In the light of these facts it does not clearly appear that the University of Illinois is a strictly governmental instrumentality of the State of Illinois of the same class as its courts, penitentiaries, police departments, fire departments, and similar agencies.

There is another fact in connection with the University of Illinois which seems to us to cast considerable doubt on its claim for exemption in this case. The University of Illinois was made possible by a land grant by the Congress of the United States. Act of July 2, 1862, c. 130, 12 Stat. 503, accepted by the Legislature of Illinois, Ill. Laws, 1863, p. 64. Since its creation the University of Illinois has received large sums of money from the Federal Treasury at various times.[5]

Under these various Acts of Congress the contribution of the Federal Government to the University of Illinois during the fiscal years 1927 and 1928 amounted to $783,733.00.[6] The goods involved in

[5] See the Hatch Act, Act of March 2, 1887, c. 314, 24 Stat. 440; the Morrill Act, Act of August 30, 1890, c. 841, 26 Stat. 417; the Adams Act, Act of March 16, 1906, c. 951, 34 Stat. 63; the Nelson Act, Act of March 4, 1907, c. 2907, 34 Stat. 1256, 1281; the Smith-Lever Act, Act of May 8, 1914, c. 79, 38 Stat. 372; the Smith-Hughes Act, Act of February 23, 1917, c. 114, 39 Stat. 929; and the Purnell Act, Act of February 24, 1925, c. 308, 43 Stat. 970.

[6] Land-Grant Colleges and Universities (Department of the Interior, Bureau of Education, Bulletin, 1928, No. 14), p. 58, shows that the Federal contribution to the University of Illinois for the year ended June 30, 1927, was $386,736. The same report for the year ended June 30, 1928 (Department of the Interior, Bureau of Education, Bulletin, 1929, No. 13) p. 62, gives the figure for that year as $396,997. The total for the two years is thus $783,733. This sum includes interest on the land-grant fund of 1862, in the amount of $32,450.66, for each of the two years involved. (See Bulletin, 1928, No. 14, p. 36; Bulletin, 1929, No. 13, p. 40.) If this interest is deducted the balance amounts to $708,832. See also R. 39.

this case were imported in 1927 and 1928. The duties imposed aggregate $1,603.75, about one-fifth of one per cent of the amount received by the University from the United States during the two years. We submit that the University is in no position to contend that it is being burdened by the Federal Government as long as the contributions received by the University from the United States exceed the duties imposed.

CONCLUSION

The judgment of the court below is correct and should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
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FEBRUARY, 1933.

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION

ARTICLE I

* * * * *

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and Provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * * * *

SECTION 10. * * *

* * * * *

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

* * * * *

ARTICLE VI

* * * * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATUTES

The Act of February 17, 1917, c. 84, 39 Stat. 922 (U. S. C., Title 49, Sec. 53), provides as follows:

> That nothing contained in the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, or the Acts amendatory thereof, shall be so construed by the Interstate Commerce Commission, or by the courts, as to prevent the lessee of the Cincinnati Southern Railway from complying with its obligation assumed in leasing said railway to furnish free transportation to the trustees of said Cincinnati Southern Railway, their officers and agents: *Provided,* That the free transportation referred to shall be furnished only when persons entitled thereto are traveling on the business of the company.

The Tariff Act of 1922, c. 356, 42 Stat. 858, 925, 934 (U. S. C., Title 19, Sec. 122), contains the following provisions:

> PAR. 1530. Any society or institution incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement

of the fine arts, or any college, academy, school, or seminary of learning in the United States, or any State or public library, may import free of duty any book, map, music, engraving, photograph, etching, lithographic print, or chart, for its own use or for the encouragement of the fine arts, and not for sale, under such rules and regulations as the Secretary of the Treasury may prescribe.

* * * * *

PAR. 1706. Works of art, collections in illustration of the progress of the arts, sciences, agriculture, or manufactures, photographs, works in terra cotta, parian, pottery, or porcelain, antiquities and artistic copies thereof in metal or other material, imported in good faith for exhibition at a fixed place by any State or by any society or institution established for the encouragement of the arts, science, agriculture, or education, or for a municipal corporation, and all like articles imported in good faith by any society or association, or for a municipal corporation, for the purpose of erecting a public monument, and not intended for sale nor for any other purpose than herein expressed; but bond shall be given, under such rules and regulations as the Secretary of the Treasury may prescribe, for the payment of lawful duties which may accrue should any of the articles aforesaid be sold, transferred, or used contrary to this provision, and such articles shall be subject at any time to examination and inspection by the proper officers of the customs: *Provided*, That the privileges of this and the preceding paragraph shall not be allowed to associations or corporations engaged in or connected with business of a private or commercial character.

APPENDIX B

RECORDS OF THE CONSTITUTIONAL CONVENTION AND OTHER CONTEMPORANEOUS WRITINGS

In the Pinckney plan, which was considered by the Committee of Detail of the Constitutional Convention, one of the items reads as follows (2 Farrand, Records of the Federal Convention, 134, 135):

> The S. & H. D. in C. Ass. [Senate and House of Delegates in Congress Assembled] shall have the exclusive Power of regulating Trade and levying Imposts—Each State may lay Embargoes in Time of Scarcity

Some light on the meaning of the language which was incorporated in the Constitution is also shed by a document in Wilson's handwriting which was also apparently considered by the Committee of Detail. 2 Farrand, Records of the Federal Convention, 157. This document, which is said to be an extract from the New Jersey plan, contains the following:

> That the United States in Congress be authorized—to pass Acts for raising a Revenue,—by levying Duties on all Goods and Merchandise of foreign Growth or Manufacture imported into any Part of the United States— * * * to pass Acts for the Regulation of Trade and Commerce as well with foreign Nations as with each other *to lay and collect Taxes*

It will be noted that this document refers to the collection of duties on *"all goods."* Certainly it can at least be said that the framers of the Constitution did not contemplate that goods which might be imported by a State would be an exception.

This broad purpose of the Convention to confer upon the Federal Government exclusive power over the regulation and taxation of foreign commerce is also disclosed in numerous other writings of the time. Thus, in the diary of Ezra Stiles, it is recorded for December 21, 1787, that Mr. Baldwin, a delegate to the Convention, said that the Convention was "pretty unanimous" on several points, one of which was that the Congress was vested "with the Power of an adequate Revenue, by Customs on Trade, Excise, and direct Taxation * * *." 3 Farrand, Records of the Federal Convention, 168, 169.

Luther Martin in his "Genuine Information" delivered to the Maryland Legislature on November 29, 1787, said (3 Farrand, 172, 204):

> By the power to lay and collect imposts, they may impose duties on *any* or *every* article of *commerce* imported into these States, to what amount they please * * *. By this part of the section therefore, the Government has power to lay what duties they please on *goods imported;* * * *.

A letter written by James Madison on September 18, 1828, shows clearly the understanding of the framers of the Constitution that the powers to regulate commerce included the power to enact a protective tariff. He wrote (3 Farrand, 477):

> That the encouragement of Manufactures, was an object of the power to regulate trade,

> is proved by the use made of the power for that object, in the first session of the first Congress under the Constitution; when among the members present were so many who had been members of the federal Convention which framed the Constitution, and of the State Conventions which ratified it; each of these classes consisting also of members who had opposed & who had espoused, the Constitution in its actual form. It does not appear from the printed proceedings of Congress on that occasion that the power was denied by any of them. And it may be remarked that members from Virga. in particular, as well of the antifederal as the federal party, the names then distinguishing those who had opposed and those who had approved the Constitution, did not hesitate to propose duties, & to suggest even prohibition in favor of several articles of her production; * * *.

In a letter written in 1832, Madison referred to the broad purpose of the Constitution to grant to Congress exclusive power over foreign commerce. He wrote (3 Farrand, 518, 519):

> The incapacity of the States separately to regulate their foreign commerce was fully illustrated by an experience which was well known to the Federal Convention when forming the Constitution. It was well known that the incapacity gave a primary and powerful impulse to the transfer of the power to a common authority capable of exercising it with effect.

See also the letter from James Madison to J. C. Cabell in 3 Farrand, 478.

The same thought was expressed by Madison in his draft of a "Preface to Debates in the Conven-

tion of 1787," where he wrote (3 Farrand, 539, 547):

> The want of authy. in Congs. to regulate Commerce had produced in Foreign nations particularly G. B. a monopolizing policy injurious to the trade of the U. S. and destructive to their navigation; the imbecility and anticipated dissolution of the Confederacy extinguishg. all apprehensions of a Countervailing policy on the part of the U. States.
>
> The same want of a general power over Commerce led to an exercise of this power separately, by the States, wch. not only proved abortive, but engendered rival, conflicting and angry regulations.

The purpose of the framers of the Constitution to grant complete and unqualified authority to Congress over the subject of imports is also indicated by many passages in the Federalist. In Nos. XI and XII of the Federalist, Hamilton refers to "the importance of the Union, in a commercial light," and specifically referring to "duties on imported articles," he states that "in America, it is evident that we must a long time depend for the means of revenue chiefly on such duties." In No. XVII, Hamilton says:

> Commerce, finance, negotiation, and war seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects ought, in the first instance, to be lodged in the national depository.

This idea is developed further in No. XXII. There Hamilton says:

> In addition to the defects already enumerated in the existing federal system,

there are others of not less importance, which concur in rendering it altogether unfit for the administration of the affairs of the Union.

The want of a power to regulate commerce is by all parties allowed to be of the number * * *. It is indeed evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence. * * *

That Congress should have an exclusive and unqualified power over duties on imports was plainly indicated by Hamilton in No. XXX, where he said:

The more intelligent adversaries of the new Constitution admit the force of this reasoning; but they qualify their admission by a distinction between what they call *internal* and *external* taxation. The former they would reserve to the State governments; the latter, which they explain into commercial imposts, or rather duties on imported articles, they declare themselves willing to concede to the federal head * * *. Who can pretend that commercial imposts are, or would be, alone equal to the present and future exigencies of the Union?

Similarly, in No. XXXII, Hamilton wrote:

* * * I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention,

> retain that authority in the most absolute and unqualified sense; * * *.
>
> An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.

Hamilton then refers to the power to lay duties on imports as one which has been exclusively delegated to the United States, and then distinguishes the power to impose taxes "on all articles other than exports and imports," which he states "is manifestly a concurrent and coequal authority in the United States and in the individual States."

In No. XLII, Madison refers to "the regulation of foreign commerce" as having "been too fully discussed to need additional proofs here of its being properly submitted to the federal administration."

APPENDIX C

ADMINISTRATIVE PRACTICE

A. Published Rulings

There are listed below all published rulings by officials of the Treasury Department and decisions of the Board of General Appraisers which have been found, relating to duties on imports by or for a State or a State instrumentality. The list is undoubtedly incomplete, as the published rulings are indexed according to the article imported, without any reference to the importer. Accordingly, it has been necessary in compiling the list of rulings, to examine the indices for articles which it seems likely a State or State instrumentality might import. In the earlier volumes most of the references were found under "books"; in later volumes most of the decisions found involved "scientific apparatus."

All of the decisions labelled "Abstract" are by the Board of General Appraisers until 1925, and by the Customs Court after that date. The other rulings are by Treasury officials or by the Board of General Appraisers, as indicated in each case. All of the rulings prior to 1891 were made by officials of the Treasury Department.

In Synopsis 2549, Synopsis of Decisions (1875) 430, the Secretary of the Treasury ruled that cer-

tain engravings imported by the Public Library of Boston were entitled to free entry on the ground that they constituted an unbound book imported for philosophical or religious purposes. A few days later in Synopsis 2567, Synopsis of Decisions (1875) 446, the Secretary considered another case involving the Boston Public Library and held that the statute then in effect allowed the library to import only two copies on any one invoice, and not two copies for each branch of the library as it had contended.

In Synopsis 4663, Synopsis of Decisions (1880) 301, the Department ruled that books imported by the Philadelphia Public Library free of duty became dutiable if surplus copies of them were thereafter sold.

Synopsis 7500, Synopsis of Decisions (1886) 192, involved the application of the City of New Orleans for free entry of blocks of Mexican marble presented to the city by the Mexican government, intended for the decoration of a city park. The application was denied. The ruling follows in full:

> TREASURY DEPARTMENT, *May 5, 1886.*
>
> SIR: The Department is in receipt of your letter of the 30th ultimo, in which you submit the application of the mayor of New Orleans, per E. L. Bower, chief clerk, for the free entry of certain blocks of Mexican marble which have been presented to the city of New Orleans by the Mexican Government, and are intended for the decoration of the city park.
>
> In reply, I have to inform you that the only articles which are exempt from duty when imported for presentation to municipal corporations are specified in paragraph

819, act of March 3, 1883, as follows, viz: "Paintings, statuary, fountains, and other works of art."

The blocks of marble in question are not embraced among these articles, and the Department is therefore unable to grant the application.

Respectfully yours,

C. S. FAIRCHILD,
Acting Secretary,
Collector of Customs, New Orleans, La.

In Synopsis 8465, Synopsis of Decisions (1887) 489, the Treasury denied a request for the free entry of instruments for making the measurements used in the Bertillon system of criminal identification, imported for the use of certain penitentiaries. The request was denied on the ground that the instruments were subject to duty under existing laws.

In Synopsis 8540, Synopsis of Decisions (1887) 545, the Treasury Department held that certain designs for a monument to be erected by the State of Indiana were entitled, as a matter of construction of the statute, to free entry.

In Synopsis 8558, Synopsis of Decisions (1887) 557, it was held as "a fair construction of the law" that books imported by the library of an appellate court of Illinois were exempt from duty. No question of constitutional power was raised.

Synopsis 9736, Synopsis of Decisions (1889) 581, involved an application for a refund of duty levied on microscope cover glasses imported for the University of Michigan. The application was allowed on the ground that the merchandise came within the provision for free entry allowed to philosophical and scientific apparatus.

In Synopsis 9748, Synopsis of Decisions (1889) 595, application was made by the Board of Education of the State of Connecticut for relief from the payment of duties assessed on certain maps. Two copies had been admitted free, leaving the remaining number subject to duty. The Department held that the assessment of duty on the excess over two was correct.

In Synopsis 10845, 1 Synopsis of Decisions (1891), 267, electric batteries imported by the Iowa Hospital for the Insane were held subject to duty because the hospital was not instituted for any of the purposes specified in paragraph 677 of the Tariff Act of 1890 allowing free entry of scientific apparatus imported for the use of any society or institution established "for religious, philosophical, educational, scientific, or literary purposes."

In Synopsis 11045, 1 Synopsis of Decisions (1891) 451, it was held by the Board of General Appraisers that celluloid labels for plants imported by the Missouri State Botanical Gardens were not entitled to free entry as philosophical instruments and apparatus.

In Synopsis 13428, 2 Synopsis of Decisions (1892) 1150, olive oil machines imported by the University of California were held subject to duty over the objection that they were "philosophical and scientific apparatus." The decision was by the Board of General Appraisers.

In Synopsis 13777, Synopsis of Decisions (1893) 182, free entry of oculists' lenses imported by the Maine Eye and Ear Infirmary was denied by the Board of General Appraisers. (This institution was incorporated under the laws of Maine, but it

does not affirmatively appear that it was a State instrumentality.)

In Synopsis 14381, Synopsis of Decisions (1893) 768, absolute alcohol imported for the use of the University of Pennsylvania was held by the Board of General Appraisers to be entitled to free entry as a scientific preparation.

In Synopsis 14725, Synopsis of Decisions (1894) 145, a model ice machine imported by the Alabama Agricultural College was held entitled to free entry as a philosophical or scientific apparatus. The decision was by the Board of General Appraisers.

In Synopsis 15237, Synopsis of Decisions (1894) 597, certain drawing instruments imported for the use of the public schools in Cambridge, Massachusetts, were claimed to be exempt from duty as scientific instruments. The Board of General Appraisers held that they were not scientific instruments and were dutiable.

In Synopsis 16230, Synopsis of Decisions (1895) 682, the Board of General Appraisers held that antitoxin imported by the City of Chicago for free distribution by its health department was not entitled to free entry, because the City of Chicago was not a society or institution of the kind described in the Tariff Act.

In Synopsis 16247, Synopsis of Decisions (1895) 697, the Department ruled that the High School of East Orange, New Jersey, was established for the encouragement of art and sciences, and was consequently entitled to import certain photographs free of duty.

In Synopsis 16441, Synopsis of Decisions (1895) 867, the Department ruled that sheep imported by

the Iowa Agricultural College for "scientific investigation" were subject to duty because the statute allowed free entry of animals only when "imported specially for breeding purposes."

In Synopsis 18156, Synopsis of Decisions (1897) 579, the Board of General Appraisers held that the Minnesota State Board of Health and the St. Paul City and County Hospital were educational and scientific institutions so that certain scientific apparatus and preparations which they imported were entitled to free entry.

Synopsis 18797, 1 Synopsis of Decisions (1898) 40, and T. D. 22079, 3 Treas. Dec. 257 (1900), involved importations of books by public libraries, the Philadelphia Free Library and the Plymouth County Law Library Association, Plymouth, Massachusetts, which were supported by public funds. In both cases the Board of General Appraisers held that the books were entitled to free entry as a matter of the construction of the statute.

Another case involving the Minnesota State Board of Health is Synopsis 19112, 1 Synopsis of Decisions (1898) 431, where the Department held the merchandise was not entitled to free entry because the importer had not complied with the regulation requiring that an affidavit showing the basis for the exemption be filed within seven days before the arrival of the merchandise.

T. D. 22281, 3 Treas. Dec. 510 (1900), known as Circular No. 87, is a compilation of the statute, regulations and rulings of the Department relating to the free importation of articles for institutions. It digests many of the rulings referred to above. T. D. 24502 and T. D. 24503, 6 Treas. Dec. 520, 522,

(1903), are similar compilations of the statute, regulations and rulings. T. D. 24536 and T. D. 24537, 6 Treas. Dec. 576, 580 (1903), are revisions of this Circular containing references to additional rulings.

T. D. 22938, 4 Treas. Dec. 359 (1901)—University of the State of New York—Department ruling—free entry of books allowed without filing an oath that the books were the "permanent property" of any particular branch.

Abstract 121, 7 Treas. Dec. 109 (1904)—New York State Cancer Laboratory—Scientific apparatus held dutiable.

Abstract 816, 7 Treas. Dec. 488 (1904)—Lyons Township High School, Lagrange, Illinois; High School, St. Louis, Mich; North Carolina Department of Agriculture; New York Agricultural Station; Connecticut Agricultural Experiment Station—scientific apparatus held dutiable for want of evidence that the institutions came within the exemption provision.

Abstract 897, 7 Treas. Dec. 558 (1904)—Washington State Agricultural College Experiment Station and School of Science—scientific apparatus allowed free entry.

Abstract 1643, 7 Treas. Dec. 881 (1904)—Connecticut Agricultural College—scientific apparatus held dutiable for want of evidence as to the character of the institution.

Abstract 1850, 7 Treas. Dec. 966 (1904)—University of Minnesota; University of Oklahoma; University of South Dakota; University of Wisconsin; Indiana University—scientific apparatus allowed free entry.

Abstract 2403, 8 Treas. Dec. 132 (1904)—University of Minnesota—scientific apparatus allowed free entry.

Abstract 2505, 8 Treas. Dec. 157 (1904)—University of Cincinnati—scientific apparatus allowed free entry.

T. D. 26834, 10 Treas. Dec. 511 (1905)—Board of Education of the City of New York—Board of General Appraisers decision—lantern slides allowed free entry over the objection that the Board of Education was a subdivision of the city and not a "society or institution" within the meaning of paragraph 638 of the Tariff Act of 1897.

Abstract 11208, 11 Treas. Dec. 682 (1906)—Connecticut Agricultural Experiment Station—scientific apparatus allowed free entry.

Abstract 22176, 18 Treas. Dec. 305 (1909)—Board of Education of the City of Chicago—enameled ware, consisting of pails, pans, and basins, held not scientific apparatus and therefore dutiable.

Abstract 15830, 13 Treas. Dec. 869 (1907)—Minnesota State Dairy and Food Commission—held not established solely for educational and scientific purposes, so that a scientific instrument was not entitled to free entry.

Abstract 23515, 19 Treas. Dec. 664 (1910)—High School of Columbus, Texas—scientific instruments held entitled to free entry.

Abstract 26392, 21 Treas. Dec. 168 (1911)—University of Kansas—container of acid held entitled to free entry as usual covering of merchandise entitled to free entry—affirmed in *United States* v. *Wyman & Co.*, 2 Ct. Cust. App. 440, T. D. 32200, 22 Treas. Dec. 119 (1912).

Abstract 33236, 25 Treas. Dec. 96 (1913)—Boston Trade School for Girls; Board of Education of the City of New York—sewing machine and scissors for teaching sewing held free of duty as scientific apparatus—affirmed in *United States* v. *Kastor & Bros.*, 6 Ct. Cust. App. 52, T. D. 35323, 28 Treas. Dec. 613 (1915).

Abstract 33857, 25 Treas. Dec. 270 (1913)—Board of Education of New York City—scissors held entitled to free entry.

Abstract 34482, 26 Treas. Dec. 40 (1914)—University of Washington—protest against duty on maps overruled for failure to comply with the regulations.

Abstract 38687, 29 Treas. Dec. 451 (1915)—Board of Education of New York City—protest against duty on scissors overruled for failure to comply with the regulations.

Abstract 38843, 29 Treas. Dec. 573 (1915)—Board of Education of New York City—scissors held entitled to free entry.

Abstract 47140, 45 Treas. Dec. 943 (1924)—University of California—protest overruled for failure to comply with the regulations.

Abstract 50335, 48 Treas. Dec. 728 (1925)—University of Michigan—goat skins for book binding held dutiable; this is apparently the first case in which the constitutional question was raised.

T. D. 43023, 54 Treas. Dec. 319 (1928)—University of Illinois—scientific apparatus held dutiable against objections on constitutional grounds—appeal to Court of Customs Appeals dismissed, Abstract 8176, 55 Treas. Dec. 1063 (1929).

Abstract 8042, 55 Treas. Dec. 1042 (1929)—University of Michigan—scientific instruments held dutiable against constitutional objections.

Abstract 9080, 56 Treas. Dec. 707 (1929)—University of Michigan—scientific instruments held dutiable against constitutional objections.

Abstract 10620, 57 Treas. Dec. 1013 (1930)—University of Illinois—copies of old coins and scientific instruments held dutiable against constitutional objections—rehearing granted, Abstract 10804, 57 Treas. Dec. 1044 (1930).

T. D. 44758, 59 Treas. Dec. 747 (1931)—University of Illinois—scientific apparatus held dutiable against constitutional objections—affirmed in *University of Illinois* v. *United States,* T. D. 45773, 61 Treas. Dec. 1334 (1932), the present case.

Abstract 19901, 61 Treas. Dec. 1605 (1932)—University of Illinois—protest based on constitutional grounds overruled.

B. Unpublished Rulings

The Treasury Department has also made numerous similar rulings which have not been published. Some of these will be briefly summarized here. On May 23, 1906, J. B. Reynolds, Assistant Secretary of the Treasury, in a letter to the Collector of Customs at Boston, Massachusetts, held that a gas burner and chimney imported by the Gas and Electric Lighting Commission of the Commonwealth of Massachusetts for research and experimental purposes was not entitled to free entry. (*Infra,* pp. 58–59.) On November 5, 1909, C. D. Hilles, Acting Secretary of the Treasury, in a letter to F. W. Rane, State Forester of Massachusetts, held that there was no authority to allow the free entry of

arsenate of lead paste for the use of the Commonwealth of Massachusetts in destroying gypsy moths. (*Infra,* p. 59.) On January 23, 1912, A. Piatt Andrew, Assistant Secretary of the Treasury, in a letter to Senator Briggs of New Jersey, informed the Senator that merchandise imported by the New Jersey State Village for Epileptics did not come within the provisions of the Tariff Law providing for free entry. (*Infra,* pp. 60–61.) On March 9, 1922, A. W. Mellon, Secretary of the Treasury, in a letter to John M. Parker, Governor of Louisiana, replied to the Governor's request that the Department reconsider its decision of February 28, holding that cement and similar material for the construction of the Agricultural College of Louisiana, and for the construction of concrete bridges, was not entitled to free entry. The Secretary stated that he was unable to direct the free entry "of such material as is included in the dutiable list of the Tariff Act of 1913." (*Infra,* pp. 61–62.)

On March 7, 1924, McKenzie Moss, Assistant Secretary of the Treasury, wrote Herbert Levy, Assistant Attorney General of Maryland, stating that "it has accordingly been the long established practice of the Department to approve the assessment of duty on articles imported for the use of a state provided they were not exempted from duty by some provision of the free list of the tariff act, and this practice, while not questioned on a constitutional ground, was upheld by the Board of United States General Appraisers." (*Infra,* pp. 62–63.)

On March 15, 1928, Frank Dow, Acting Commissioner of Customs, in a letter to Senator Stei-

wer, stated that the Department knew of no reason why certain tow machines, imported by the State flax industry for the exclusive use of the State of Oregon, should be treated any differently than merchandise of any other importer. (*Infra,* pp. 63–64.)

On March 29, 1928, Mr. McNary introduced S. 3823, which was a bill "to remit the duty on machinery imported by the State of Oregon for the use of the State flax industry." (*Infra,* p. 65.) With reference to this bill Carl T. Schuneman, Acting Secretary of the Treasury, wrote the Chairman of the Senate Finance Committee, stating that he favored general rather than special legislation in such matters, but making no recommendation on the bill since it involved a matter within the discretion of Congress. (*Infra,* pp. 65–67.) The bill was not reported out of the Committee on Finance.

Text of Unpublished Rulings, Etc., Referred to in this Appendix

MAY 23, 1906.

The COLLECTOR OF CUSTOMS,
Boston, Mass.

SIR: Referring to your letter of the 10th instant, relative to the free entry of a certain gas burner and chimney, imported by the Gas and Electric Lighting Commission of the Commonwealth of Massachusetts, for research and experimental purposes, I have to inform you that the Collector of Customs at New York reports that the free entry of said articles was denied at that port for the reason that it did not appear that the same were imported for the use and by the order of any society or institution incorporated or established solely for religious, philosophi-

cal, educational, scientific, or literary purposes, or for the encouragement of the fine arts, or for the use or by the order of any school, academy, or seminary of learning in the United States, which action meets with the Department's approval.

T. D. 26834, of November 2, 1905, cited by you, is not applicable to the importation in question, for the reason that the goods under consideration in that decision, were imported by the Board of Education of the city of New York for use in the public schools in that city.

Your attention is invited to T. D. 16230, of June 6, 1895, in which it is held that articles imported for the municipality of the city of Chicago, are not entitled to free entry under the provisions of paragraph 638 of the Act of 1897.

Respectfully,
(Signed) J. B. REYNOLDS,
Assistant Secretary.

NOVEMBER 5, 1909.

Mr. F. W. RANE,
State Forester, State of Massachusetts,
6 Beacon Street, Boston, Mass.

SIR: In reply to your letter of the 19th ultimo, I have to state that there is no authority of law for the free entry of arsenate of lead paste for the use of the Commonwealth of Massachusetts against the gypsy moths, etc. Duty would have to be collected on the article, and probably at the rate of twenty-five per centum ad valorem, under paragraph 3 of the tariff of 1909, as a chemical compound.

Respectfully,
(Signed) C. D. HILLES,
Acting Secretary.

JANUARY 23, 1912.

Honorable FRANK O. BRIGGS,
United States Senate.

SIR: I have the honor to acknowledge the receipt of your letter of the 15th instant in regard to the free entry of articles for the New Jersey State Village for Epileptics at Skillman, New Jersey.

The only provisions of law under which free entry for this institution could be granted are paragraphs 519 and 650 of the existing tariff act, which limit the free entry to articles imported for institutions established *solely* for religious, philosophical, educational, scientific, and literary purposes. The Board of United States General Appraisers held, on June 12, 1900 (Treasury Decision No. 22279), that a hospital with incidental educational features is not an institution incorporated or established solely for educational purposes nor a college, academy, school, or seminary of learning. The decision of the United States Circuit Court of Appeals in *Massachusetts General Hospital* v. *the United States,* 112 Fed. Rep. 670, affirmed the Board's decision. Following these decisions the Department has refused free entry to articles imported for the use of Letchworth Village of Thiells, New York, which was established for the custodial care of epileptics of unsound mind and other feeble-minded people, holding that the educational features of the institution are merely incidental.

If the New Jersey State Village for Epileptics is an institution similar to that established under the New York State laws the Department would be constrained to rule

that it is not entitled to the privilege of free entry under said paragraphs.

Respectfully,

(Signed) A. PIATT ANDREW,
Assistant Secretary.

MARCH 9, 1922.

Honorable JOHN M. PARKER,
Governor of Louisiana,
Baton Rouge, La.

MY DEAR GOVERNOR: The Department is in receipt of your letter of the 4th instant, further in regard to the importation of cement and similar material for the construction of the Agricultural College of Louisiana, and for the construction of concrete bridges, which will represent the joint work of your state and the United States Government.

You request a careful reconsideration of the Department's decision of February 28th, holding that articles or materials are not entitled to admission free of duty because imported for the use of a state government.

As under the Tariff laws of the United States all articles are subject to duty unless specially exempted therefrom by some provision of law, the Department is vested with no discretionary power under which it may make a favorable ruling in the case under consideration. The interest of the Federal Government in the building of bridges within the state can not operate to relieve the state from the payment of duty, as material imported for the use of the United States Government is subject to duty in the absence of exemption by express provision of law.

I regret that I am, therefore, unable to direct the free entry for the purposes mentioned of such material as is included in the dutiable list of the Tariff Act of 1913.

Very truly yours,
(Signed) A. W. MELLON, Secretary.

MARCH 7, 1924.

MR. HERBERT LEVY,
Assistant Attorney General,
State Law Department,
Baltimore, Md.

SIR: The Department is in receipt of your letter of January 23rd last, relative to the right of the State of Maryland to import scientific apparatus without the payment of duty. You state that you have reached the conclusion that merchandise imported by a state is not properly subject to the provisions of the tariff laws and you request a discussion of the Department's ruling of January 10th with a view to avoiding litigation on the question.

As it is not the function of the Department to determine the constitutionality of the tariff act as relating to the importation of merchandise by State Governments, it appears that discussion of this phase of the question would serve no good purpose. The intent of Congress to authorize the assessment of duties on such importations is evidenced by the fact that it has expressly exempted from duty books and certain other articles imported for State Libraries.

It has accordingly been the long established practice of the Department to approve the assessment of duty on articles imported for the use of a state provided they were not exempted from duty by some pro-

vision of the free list of the tariff act, and this practice, while not questioned on a constitutional ground, was upheld by the Board of United States General Appraisers in T. D. 13428, T. D. 16230, and T. D. 28278, abstract 15830. The Department is of course without authority to direct the free entry of articles made dutiable by an Act of Congress in the absence of a judicial decision declaring such enactment to be unconstitutional.

If you desire to secure a judicial determination of the question it is suggested that you file, in accordance with the provisions of section 514 of the Tariff Act of 1922, a written protest against the assessment of duty on an entry filed in the name of the state, if such an entry is now pending, and the matter will then be given consideration by the Board of United States General Appraisers.

Respectfully,

(Signed) McKenzie Moss,
Assistant Secretary.

March 15, 1928.

Honorable Frederick Steiwer,
United States Senate.

My dear Senator: I am in receipt of your letter of the 12th instant, enclosing a communication from the Superintendent of the State Flax Industry addressed to you under date of the 6th idem, in which for the reasons advanced in his letter he expresses the opinion that an Etrich tow machine if imported for the exclusive use of the State of Oregon would be entitled to admission free of duty.

The Department is aware of no provision of law which would authorize the treatment

for customs purposes of merchandise imported by a state differently than for merchandise of any other importer, and as Congress has not authorized the free entry of machines of the character under consideration in the Free List of the tariff act they are subject to duty. It is not quite clear from the letter of Mr. Meyers just what would be the proper rate of duty to assess upon the machine. Paragraph 372 of the tariff act provides that textile machinery or parts, finished or unfinished, shall be subject to duty at the rate of 35% ad valorem and if the Etrich tow machine is used in the preparation of flax for the spinning of yarn or the preparation of material for use in the weaving of flax, it would be dutiable at the rate of 35% ad valorem. Otherwise it would be dutiable at the rate of 35% ad valorem under the last provision of paragraph 372 which provides that rate on machines, not specially provided for.

I am enclosing a copy of the tariff act of 1922 so that if you desire you may send the same to Mr. Meyers for his further information.

Very truly yours,
(Signed) FRANK DOW,
Acting Commissioner of Customs.

S. 3823

70TH CONGRESS
1ST SESSION

IN THE SENATE OF THE UNITED STATES

MARCH 27 (calendar day, MARCH 29), 1928

Mr. MCNARY introduced the following bill; which was read twice and referred to the Committee on Finance

---

A BILL

To remit the duty on machinery imported by the State of Oregon for the use of the State flax industry.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury is authorized and directed to admit free of duty any machinery for the preparation of flax or flax fiber for manufacture or the manufacture of linen cloth from flax or flax fiber that may be imported by the State of Oregon for the use of the State flax industry.

APRIL 9, 1928.

DEAR MR. CHAIRMAN: I am in receipt of a letter dated the 31st ultimo, requesting that your committee be furnished with a report on the merits of S. 3823, a bill to remit the

duty on machinery imported by the State o
Oregon for the use of the State flax industry

The bill provides for the admission fre
of duty of any machinery for the prepara
tion of flax or flax fiber for manufacture o
the manufacture of linen cloth from flax o
flax fiber that may be imported by the Stat
of Oregon for the use of the State flax in
dustry.

An application of the Secretary of th
Oregon State Board of Control for the fre
entry of certain machinery of this characte
was submitted to the Department by the col
lector of customs at Portland, Oregon, unde
date of the 6th ultimo, and the Departmen
declined to authorize its admission withou
the payment of duty for the reason that tex
tile machinery not specially provided fo
is dutiable at the rate of 35% ad valoren
under paragraph 372 of the tariff act and
that Congress has not authorized the specia
treatment of articles of this character im
ported by or for the use of a state govern
ment. That it was intended that state gov
ernments should pay duty unless specially
exempted therefrom is evidenced by the pro
visions in the Free List of the tariff act fo
books for State libraries and works of art
and similar articles for exhibition by a State.

The Department has necessarily denied
many applications for the free entry of arti
cles imported for the various State govern
ments, and I know of no special circum
stances in this case which would differenti
ate it from the cases above mentioned. I
am inclined to favor general rather than
special legislation in matters of this kind,
but as the question is one entirely within the
discretion of the Congress I do not deem it
advisable to make a recommendation on the

merits of the bill. It is believed that the bill, if passed in its present form would involve no unusual administrative difficulties.

Very truly yours,

(Signed) CARL T. SCHUNEMAN,
Acting Secretary of the Treasury.

Honorable REED SMOOT,
Chairman, Committee on Finance,
U. S. Senate.

U. S. GOVERNMENT PRINTING OFFICE : 1933

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Office Supreme Court, U. S.
FEB 1
CHARLES ELMORE CROPLEY, Clerk

Supreme Court of the United States,

OCTOBER TERM, 1932.

No. 538

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

BRIEF FOR AMICI CURIAE.

WILLIAM A. SCHNADER,
Attorney General of the Commonwealth of Pennsylvania.

WILLIAM A. STEVENS,
Attorney General of the State of New Jersey.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1932.

No. 538.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS,
Petitioner,
vs.
THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

BRIEF OF AMICI CURIAE.

The Opinions Below.

The opinion of the United States Court of Customs and Patent Appeals (R. 63) is reported in 61 Treas. Dec. p. 1334 (T. D. 45773). The opinion of the United States Customs Court (R. 51) is reported in 59 Treas. Dec. p. 747 (T. D. 44751).

Jurisdiction.

The judgment of the Court of Customs and Patent Appeals became final through denial of a petition for rehearing on October 10, 1932, (R. 114); mandate was stayed by order of the Presiding Judge of that Court on October 17, 1932, (R. 115); petition for a writ of certiorari was filed in this Court on December 6, 1932; the

petition was granted on January 9, 1933. Jurisdiction of this Court rests upon Section 195 of the Judicial Code, amended by the Act of June 17, 1930, C. 497, Title IV, Sec. 647, 46 Stat. 762 (Sec. 308, Title 28, U. S. C. A.), and Section 8, Act of February 13, 1925, C. 229, par. 8, 43 Stat. 940 (Sec. 350, Title 28, U. S. C. A.). Should the amendment to Sec. 195 of the Judicial Code, made by the Tariff Act of June 17, 1930, be regarded inapplicable, because the importation took place in 1927, the filing of a certificate of importance by the Attorney General would, nevertheless, be unnecessary, inasmuch as the instant proceeding draws in question the construction of the Constitution of the United States.

Questions Presented.

1. Whether, under the Tariff Act of September 21, 1922, C. 356, Title I, Sec. 1, 42 Stat. 858, and particularly paragraphs 218, 228, 360 and 372 thereof, the Collector of Customs at the Port of Chicago had the right to levy and collect, and whether the Board of Trustees of the University of Illinois are obligated to pay customs duties on scientific articles imported for educational use by the University.

Subordinate subjects involved in the foregoing and discussed in the Court of Customs and Patent Appeals, are:

(a) To fix a rate of duty on any imported merchandise, no matter by whom imported, is a proper exercise of a power exclusively delegated to the Congress.

(b) Customs duties are levies upon merchandise.

Statutes Involved.

The statutes involved appear in the Appendix, pages 11 and 12.

Statement of the Case.

The merchandise involved in this suit is certain laboratory equipment imported by the University of Illinois, the petitioner, to be used for educational purposes. It was assessed by the Collector of Customs at the Port of Chicago with duty under various paragraphs of the Tariff Act of 1922. The University of the State of Illinois protested against the assessment by the Collector and claimed the merchandise to be free of duty upon the following allegations:

1. Said tax is illegal and wrongfully assessed.

2. The Federal Government has no authority to impose such duty upon imports made by the State of Illinois.

3. Such goods are necessary instrumentalities to carry on the governmental operation of the State of Illinois.

4. The University exercises governmental functions and needs the merchandise heretofore described in the execution of such functions and intends to use the same for such purpose.

5. The assessment is paid to prevent seizure of the property of the University of Illinois.

The issues came on for trial before the United States Customs Court, which Court decided in favor of the Government in an opinion reported in 59 Treas. Dec. p. 747, (T. D. 44758). From the judgment of the Customs Court, an appeal was taken to the United States Court of Customs and Patent Appeals where the judgment of the Trial Court was affirmed in 61 Treas. Dec. p. 1334 (T. D. 45773). A petition for a writ of certiorari to the United States Court of Customs and Patent Appeals has been granted bringing on the judgment below for review.

Specification of Errors Urged by the Petitioner.

1. The Court of Customs and Patents Appeals erred in holding that the ad valorem duties collected from the Petitioner upon scientific equipment, which was purchased abroad because not obtainable in the home market, were properly collectible and did not constitute a prohibited burden upon, or an illegal tax on, property of the State of Illinois used by the latter in performing a strictly governmental function.

2. The Court of Customs and Patent Appeals erred in affirming the decision of the Customs Court.

Summary of Argument.

I.

It is within the power of the Congress. derived from the Constitution, to fix a rate of import duties to be paid when articles imported into this country from abroad enter the commerce of the United States. The power may properly be exercised for the purposes of raising revenue; it may be exercised as a measure adopted in pursuit of a national policy of protection for domestic industries; it may be exercised in regulating foreign commerce, since all these powers mentioned are within the exclusive grant of power. The purpose of the exercise of power can not be questioned so long as it is within the sphere of the constitutional functions of the Congress. The power is not restricted. The exercise of the power falls upon individuals, the Petitioner, the State and the Federal Government alike, if such be the will of the Congress.

II.

A duty on imports is a levy on the article *per se* for which the importer becomes ultimately liable. All customs statutes are predicated on the theory that when merchandise is brought into the jurisdiction of the port of entry, duty attaches and the Government through its statutes and regulations retains possession of the merchandise until all questions of duty are settled. If the duty were a tax on the individual, he would be entitled to immediate possession of and dominion over the merchandise, the Government proceeding against the individual in the collection of the tax.

ARGUMENT.

I.

All customs duties are levied by Congress under the grant of power in the Federal Constitution, clause 1, section 8, Article I, and clause 3, section 8, Article I. Said clauses read as follows:

> 1. To lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;
>
> 3. To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes;

The powers granted to the Congress by these provisions of the Constitution are without restriction, and in the exercise of its functions it is difficult if not impossible to tell where Congress in levying duties is exercising its power to raise revenue or exercising its power

to regulate commerce since a duty may often result in a virtual embargo—

> not alone directly by the enactment of embargo statutes, but indirectly, as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which, in and of themselves, amounted to the assertion of the right to exclude merchandise at discretion. (*Brolan* v. *United States,* 236 U. S. 216).

It has repeatedly been announced that the Congress may place an embargo, total or partial, upon importations from foreign countries, under the exercise of the constitutional powers to regulate commerce. (*United States* v. *Marigold,* 9 How. 559; *The Abby Dodge,* 223 U. S. 166; *Weber* v. *Freed,* 239 U. S. 325; *Hammer* v. *Dagenhart,* 247 U. S. 251.) As Congress has the right to absolutely prohibit importation, it also has plenary power to prescribe the conditions upon which the importation may be made. (*Sang Lung* v. *Jackson,* 85 Fed. 502; *United States* v. *American Exp. Co.,* 177 Fed. 735, 738)—

> • • • Impost duties take every conceivable form, as may by the legislative authority be deemed best for the general welfare. They have been at all times often specific. They have sometimes been discriminatory, particularly when deemed necessary by reason of the tariff legislation of other countries. (*Knowlton* v. *Moore,* 178 U. S. 41, 88).

An additional duty fixed upon goods coming from east of the cape of Good Hope was held to be valid as a regulation of commerce. (*Russell* v. *Williams,* 106 U. S. 623). In the more recent case of *Hampton* v. *United States,* 276 U. S. 394, this Court was of the opinion that a customs duty, although imposed in pursuance of an expressed policy of protection to domestic industries, was valid and enforcible. To like effect was *Arnold* v.

United States, 147 U. S. 494, 497. The power to regulate commerce——

> like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. (*Gibbons* v. *Ogden,* 9 Wheat. 1, 196.)

From the decisions of this Court above cited, it appears conclusive that it was within the constitutional power of the Congress to levy duties when the articles here imported entered the commerce of the country irrespective of the individual or the instrumentality causing their importation. This it might do for the purpose of raising revenue, of providing protection to the industries of the country, or of regulating foreign commerce, inasmuch as the exercise of all of these is within the exclusive power delegated by the Constitution. If, therefore, the levy of duty upon the articles imported falls within this exclusive power, it can not be questioned by one who causes the importation of the articles. Had the Congress placed an embargo on the importation of the articles here imported, it seems from the citations given above that it would apply with equal force to the State of Illinois and its instrumentality as it would to individuals importing like merchandise. It follows that what the Congress has power to do in full, it may do in part.

If there is any doubt as to the intent and purpose of the Congress in enacting the statute prescribing the duties on the importation of the articles here, reference to the preamble of the statute will clearly dispel it:

> An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes (Tariff Act of 1922, supra.).

II.

There is no vested right to import into the United States merchandise from a foreign country. It is a privilege conferred by act of the Congress upon the terms prescribed by the Congress and may only be exercised by complying with the restrictions placed upon it. (*Buttfield* v. *Stranahan*, 192 U. S. 470.) Nor, in reason, can it be seen how an agency of a State stands in any position different from an individual in this respect. The petitioner, in exercising its privilege to import, did so subject to the conditions prescribed by the Congress, one of which was the payment of duty. The goods imported in the case at bar were foreign goods and did not become merged into the commerce of the country until the duties were levied and paid. (*Sonneborn Bros* v. *Cureton*, 262 U. S. 506, 509; *Faber, Coe & Gregg* v. *United States*, 19 C. C. P. A. (Customs) 8, T. D. 44851). A tax upon the imported goods, while it remains a part of foreign commerce and is not introduced into the general mass of property in a State, differs greatly from a tax upon the property after it has been imported. (*License Cases*, 5 How. 504, 575.).

In *Brown* v. *Maryland*, 12 Wheat. 419, at page 439, this Court announces the principle——

> A duty on imports is a tax on the article, which is paid by the consumer.

This doctrine has been uniformly followed since that decision, and based upon the authority of that case all of our customs statutes rest. It is the theory of customs jurisprudence that when merchandise is brought into the jurisdiction of the port of entry the duty attaches, and it is on that theory the Government retains possession of the importations either actually or constructively under bond for redelivery until all questions of duty are settled

and all exactions paid. If the duty did not attach to the merchandise itself, and hence become a lien upon the merchandise, it would be difficult to justify the retention of the merchandise by the Government until its exactions were collected. If the duty were a tax on the individual, he would be entitled to his merchandise and the Government would have to proceed against the individual.

This leads to the point we consider of the utmost importance to all industry in the United States and to the welfare of the individual States. If it is without the power of the Congress to levy duties upon merchandise imported by the several States of the Union, it is likewise without the power of the Congress to levy duties upon merchandise imported by other taxing entities of those States. It would logically follow that all municipalities, counties and other subdivisions would have the right to import merchandise without regard to restrictions, duties levied or embargoes placed upon such imports by the Congress of the United States. From the decisions cited no basis exists for that interpretation of the law. That it is the clear intent of the Congress to levy duties upon the importation of articles not only by States, municipalities and all others including the United States, is apparent from the fact that it deemed necessary the inclusion in the Tariff Act of 1922 of provisions exempting from duty certain importations for the use of the United States, the Library of Congress and State and public libraries:

> Par. 1527. Books, engravings, photographs, etchings, bound or unbound, maps and charts imported by authority or for the use of the United States or for the use of the Library of Congress.
>
> Par. 1530. Any society or institution incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement of the fine arts, or any college, academy, school, or seminary of learn-

> ing in the United States, or any State or public library, may import free of duty any book, map, music, engraving, photograph, etchings, lithographic print, or chart, for its own use or for the encouragement of the fine arts, and not for sale, under such rules and regulations as the Secretary of the Treasury may prescribe.

This, we think, is conclusive of our position that all customs duties are levied on the merchandise.

Conclusion.

To the States we represent it would be far more serious to destroy the ability of the Congress to protect certain industries from destructive foreign competition than to be obliged to pay import duties on foreign-made goods consumed by the State and its political subdivisions. For certain commodities produced and manufactured, public agencies are among the largest customers. Road-building materials are an excellent example. It would be disastrous, by adopting petitioner's argument in this case, forever to deprive the Congress of the power to protect against foreign competition, producers of these materials.

This is our reason for filing this brief in support of the Government's position.

WILLIAM A. SCHNADER,
Attorney General of the Commonwealth of Pennsylvania.

WILLIAM A. STEVENS,
Attorney General of the State of New Jersey.

February, 1933.

APPENDIX.

Statutes Involved.

Act of Congress, September 21, 1922 (Tariff Act of 1922), C. 356, Title I, Sec. 1, 42 Stat. 858.

An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes * * *

Section 1. * * * except as otherwise specifically provided for in this Act, there shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila) the rates of duty which are prescribed by the schedules and paragraphs of the dutiable list of this title, namely; * * *

Par. 218. Biological, chemical, metallurgical, pharmaceutical, and surgical articles and utensils of all kinds, including all scientific articles, utensils, tubing and rods, whether used for experimental purposes in hospitals, laboratories, schools or universities, colleges, or otherwise, all of the foregoing, finished or unfinished, composed wholly or in chief value of glass or paste, or a combination of glass and paste, 65 per centum ad valorem;

Par. 228. Azimuth mirrors, sextants, and octants; photographic and projection lenses, opera and field glasses, telescopes, microscopes, and other optical instruments, and frames and mountings for the same; all the foregoing not specifically provided for, 45 per centum ad valorem.

Par. 360. Philosophical, scientific, and laboratory instruments, * * * and parts thereof, * * * 40 per centum ad valorem:

Par. 372. * * * all other machines or parts thereof, finished or unfinished, not specially provided for, 30 per centum ad valorem; * * *

Sec. 201. That on and after the day following the passage of this Act, except as otherwise specially provided for in this Act, the articles mentioned in the following paragraphs, when imported into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila), shall be exempt from duty:

Par. 1527. Books, engravings, photographs, etchings, bound or unbound, maps and charts imported by authority or for the use of the United States or for the use of the Library of Congress.

Par. 1530. Any society or institution incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement of the fine arts, or any college, academy, school, or seminary of learning in the United States, or any State or public library, may import free of duty any book, map, music, engraving, photograph, etching, lithographic print, or chart, for its own use or for the encouragement of the fine arts, and not for sale, under such rules and regulations as the Secretary of the Treasury may prescribe.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

SECTION 8. The Congress shall have Power To lay and and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * * * * * * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 538

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

PETITIONER'S PETITION FOR REHEARING

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PETITIONER'S PETITION FOR REHEARING

The Petitioner asks a rehearing in this case because:

1. The position of the Petitioner is inaccurately stated in the opinion, and, therefore,

2. The fundamental questions of law on which a decision on the merits necessarily turns have been neither examined nor decided by this Court.

3. The opinion conflicts with prior decisions of this Court, not discussed in the opinion, which appear to have been inadvertently overlooked and, therefore, not advisedly, though in fact, overruled.

4. The foundation principle of the opinion—that the customs duties here challenged may be sustained, at the option of Congress or this Court, as an exercise of either the power to tax or the power to regulate foreign commerce—seems to be rested principally upon a misinterpretation of language used in *Gibbons* v. *Ogden*, 9 Wheat. 1, 202, and Story on the Constitution, and especially upon a quotation which purports to come from the opinion of this Court in *Groves* v. *Slaughter*, 15 Pet. 449, 505, but which is in fact a secondary *obiter* observation from the specially concurring opinion of Justice McLean while giving his personal views upon a question (related to the very live issue of slavery, in 1841) said by him not to be "necessary to a decision of the case."

Theory of Opinion Not Responsive to Petitioner's Position

It seems that the decision is predicated upon the principle that the source of the Tariff Act of 1922 in general and in its entirety is the power to regulate foreign commerce, and that the Petitioner is not entitled to immunity from the exercise of this power. This conclusion concerning the Tariff Act of 1922 is in irreconcilable conflict with *Hampton & Company* v. *United States*, 276

U. S. 394; and Petitioner does not claim immunity, general or special, against the exercise of congressional power to regulate foreign commerce. It is, further, said that Congress, or rather, "the people of the United States act through a single government with unified and adequate national power" with respect to foreign intercourse and trade, and, therefore, the exaction must be paid alike by the States when bringing their own governmental instrumentalities into the country and by individuals engaged in private commerce. Any other conclusion, it is said, would "undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create."

These statements, undoubtedly sound in response to a certain contention, are as clearly not responsive to the true position taken by the Petitioner in this case. Brief for Petitioner, 2; Reply Brief, 12; Petition for Writ, 14. They are pertinent in support of the proposition that Congress may, under the commerce clause, levy exactions, in form taxes, in aid of regulation, and that the States cannot complain on that account, a proposition not put in issue by the facts, and not only not contested by Petitioner, but specifically conceded by its counsel,

and sustained in the *Head Money Cases,* 112 U. S. 580, and *Veazie Bank* v. *Fenno,* 8 Wall. 533.

The Holding

This Court holds that the import duties challenged are constitutionally imposed under the power to regulate foreign commerce and that the immunity of State governmental instrumentalities against federal taxation is inapplicable, notwithstanding

The Governing Statutes

here challenged provide that "There shall be levied, collected, and paid * * * upon all articles when imported from any foreign country into the United States * * * the rates of duty which are prescribed by the schedules and paragraphs of the dutiable list of this title, namely; * * * *

"Par. 360. Philosophical, scientific, and laboratory instruments * * * and parts thereof * * * 40 per centum ad valorem * * * * "

The foregoing language this Court holds to be the language of the commerce power; the Petitioner, on the contrary, respectfully but emphatically urges that it is the plain and natural language of the taxing power. This precise question is not discussed in the opinion.

If the foregoing and the other three virtually identical sections specifically challenged in this proceeding as not applicable to the Petitioner, be, as the opinion implies, held commerce regulations, *what* paragraphs in the Tariff Act of 1922 *are* for the purpose of raising revenue? Obviously, not one single paragraph in that whole Act of about sixteen hundred sections—nor in any other tariff act ever enacted, for that matter—can be pointed out which is enacted in execution of the title purpose "to provide revenue," for not a single one of them more distinctly or more baldly manifests an unmixed purpose "to provide revenue" than do the sections challenged. It seems to this Petitioner that the opinion, contrary to the conclusion in *Hampton & Company* v. *United States,* supra, not only divests the Tariff Act of 1922 of all its revenue aspects, but amounts to a holding that the English language cannot express a purpose "to provide revenue" in such a way that the government cannot henceforth successfully and when expedient, say that the purpose is "to regulate commerce." Moreover, from now on tariff acts may as appropriately originate in the Senate as in the House.

PETITIONER'S TRUE CONTENTION

The fundamental position of the Petitioner is, and

was in the Court below, that the *specific sections,* on which the Government relies to justify the imposition of the duties challenged, are tax and not regulatory paragraphs; and this fundamental position goes unnoticed by this Court, save for the sweeping generalization that the Tariff Act of 1922 is a regulation of commerce. See citations to Briefs, supra.

CONFLICT WITH PRIOR DECISIONS

In *Hampton & Company* v. *United States,* supra, at p. 411, Chief Justice Taft, speaking for this Court, said that customs revenue laws have in many instances been drawn since 1789 with the view to maintaining a system of protection; (p. 412) that so long as the motive of Congress is to secure revenue for the Government the existence of other motives, such as to protect domestic industry, is of no consequence; and he concludes (p. 412) by saying that the Act of 1922 is a "revenue act." In the instant decision the *entire* Act is treated as a regulation of commerce, and nothing else. As the Petitioner views the matter, this conclusion is not only without justification, in the light of the explicit language of provisions of the Act of 1922 which are here challenged, but it is in direct conflict with the above named decision of this Court.

The reasoning of this Court in *South Carolina* v. *United States,* 199 U. S. 437, is overruled without reference or discussion. There, among other things, Justice Brewer, speaking for the majority, said: "The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty."

The point of the observation was that if the contention of South Carolina were sustained, the State, by going into "private business," could dry up the sources of national income and destroy the Federal Government. This Court could not, it seems, say that the "same argument" would lead to the conclusion indicated by Justice Brewer, except for the fact that the implied prohibition against federal burdens on State governmental agencies applied with like force to the exertion of the power to levy customs duties as to the exercise of the power to levy excise taxes; and if a customs duty could be sustained under the commerce clause, as this Court now seems to hold, plainly, Justice Brewer and those who agreed with him, could not say that "the same argument" would exempt the importation from duty, as, it was claimed, exempted the sale of liquor from the

excise tax. By no process of reasoning can the statement supra be harmonized with the language, theory, or result of the opinion in the instant case.

We have pointed to this reasoning of the highest Court in the country again and again, and stood on it in the face of the contention that the duty could be sustained under the commerce clause, and that the implied prohibition against burdening governmental instrumentalities of the State did not apply in the case of taxes levied upon imports; yet no court so far and no counsel for the United States Government has ever attempted to answer or explain away this obviously pertinent reasoning. We respectfully urge that the language quoted and the Justice who spoke it, and the concurring Justices for whom he spoke, should be accorded at least as deferential consideration as the secondary *obiter dictum* of Justice McLean, relied on in the opinion in the instant case.

We think, also, that the opinion cannot be reconciled with *Gibbons* v. *Ogden,* where Chief Justice Marshall clearly points out that the commerce and the taxing powers are substantive and distinct and that the levying of customs duties is an exercise of a branch of the latter. A more extended reference to this case follows.

Gibbons v. Ogden Misapplied

The opinion cites this case and Chief Justice Marshall as authority for the holding that the duties here challenged may "be imposed in the exercise of the power to regulate commerce." Opinion, 2. At page 202 Chief Justice Marshall uses the following words, in speaking of the members of the Constitutional Convention *at the time* that body was in session: "Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which *preceded* the war of our revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, *was* not controverted; but the right to impose a duty for the purpose of revenue, produced a *war* * * * * These restrictions, then, are on the taxing power, not on that to regulate commerce * * * * * "

It is respectfully but emphatically urged that the quotation above does not support the conclusion that customs duties may in the instant case or in all cases be sustained interchangeably under the power to regulate commerce and the power to tax. Indeed, in the next preceding paragraph the great Chief Justice had made it perfectly plain that the precise opposite was his own

view of the matter. He there had said concerning the commerce and the taxing powers: "The Constitution, then, considers these powers as substantive, and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes and that seems to be its natural place."

The portion quoted above and relied on in the opinion in the instant case, if taken in the sense it is seemingly taken by this Court now, amounts to a holding that the *source* of the power to levy customs duties is the commerce power; that is, that customs duties—for revenue —may be justified by invoking either power, according to current exigencies. This concept is completely negatived by the language used by Chief Justice Marshall on page 201; and the words used by Chief Justice Marshall, seemingly relied on by this Court now, show, undeniably as it seems to us, that he does not mean to say that *now* and *under* the Constitution duties may be levied under the commerce clause, but he means to say that *prior* to the revolutionary war the "right to regulate commerce, even by the imposition of duties, was not controverted." The context clearly supports this interpretation. He speaks of discussions *preceding* the revo-

lution; he then directly speaks of duties which brought on the revolutionary war, but in a clause immediately following the first statement and a part of the sentence containing the second, the Chief Justice says that it was not controverted that commerce could be regulated by the imposition of duties. It seems to us not only to violate the plain meaning of language, but to impute to the Chief Justice erratic thinking and intellectual steeplechasing to apply this language as an interpretation of the Constitution which came into existence long *after* the period he is describing.

With the utmost respect, but with the emphasis due a litigant whose rights we solemnly aver have been denied, we urge that *Gibbons* v. *Ogden* does not contain even a *dictum* to support the opinion in the instant case on the point that the Tariff Act of 1922, as a whole and in its various parts, may claim the commerce rather than the taxing power as its source.

Groves v. Slaughter

At pages 2 and 3 of the printed opinion this Court quotes from *Groves* v. *Slaughter,* 15 Pet. 449, 505. The quotation reads: "Under the power to regulate foreign commerce Congress impose duties on importations, give

drawbacks, pass embargo and non-intercourse laws, and make all other regulations necessary to navigation, to the safety of passengers, and the protection of property."

Plainly, it is here said that Congress has the power to regulate foreign commerce and may, under the commerce power, impose duties on importations; as plainly the language quoted should be accorded no weight, either from the standpoint of precedent or of reasoning. Our reasons for making this statement are, we think, wholly conclusive.

The impression received by the reader of the quoted portion on pages 2 and 3 is that (a) the language is that of the prevailing opinion of the Court, and (b) that the point was necessarily involved in the case. In both respects the impression is palpably erroneous.

In this case the suit was on a promissory note for $7,000 given in a transaction involving the purchase of slaves who were brought into the State of Mississippi. As stated in the prevailing opinion by Justice Thompson, on page 497 of the official report, "The defense rested entirely upon the alleged illegality of the consideration in the note." The validity of this defense turned upon the construction to be given to an article

in the Constitution of the State of Mississippi, adopted in October, 1832, to the effect that, "The introduction of slaves into this State, as merchandise, or for sale, shall be prohibited, from and after the first day of May, 1833 * * * * *" The slaves were imported into the State in the years 1835 and 1836. There was thus no question in the case concerning the power of Congress, under the clause granting control over foreign commerce, to levy customs duties. A precedent more alien, in any and all aspects, to the case at bar can scarcely be imagined.

The language quoted by this Court in the instant case does not appear in the main opinion written by Justice Thompson. It appears in the *specially concurring* opinion of Justice McLean, on page 505. Justice McLean discusses a point which he states is not involved in the case, saying: "And although the question I am to consider is not necessary to a decision of the case; yet * * * I deem it fit and proper to express my opinion upon it." The precise but foreign question discussed by Justice McLean was "whether this provision (in the Constitution of Mississippi) is in conflict with that part of the Constitution of the United States, which declares that Congress shall have power 'to regulate commerce

with foreign nations, and among the several States.'" It is thus clear that the language quoted in the instant opinion was not necessary even to a discussion of the point Justice McLean had stated. The statement is a *dictum* within a *dictum,* in a concurring opinion by one member of the Court, with which secondary *dictum* no other member concurred, and which no other Justice considered or discussed.

The author of this petition has no desire to enter into a discussion of the weight to be given *obiter dicta.* This Court has spoken to the point many times, and was, indeed, on at least one occasion, forced to sift and reject *dicta* from decided matter in an opinion by Justice McLean. In *Gordon* v. *Longest,* 16 Pet. 97, Mr. Justice McLean intimated, as this Court later said, that mandamus might lie to compel action by a state court, but in the case of *In re Blake,* 175 U. S. 114, this Court repudiated the pronouncement and said that it "cannot be regarded as authoritative." Nevertheless, the statement was in a prevailing and unanimous opinion, whereas, in the instant case the secondary *dictum* of Justice McLean, quoted in the instant opinion, was in a specially concurring opinion in which no other member concurred. Chief

Justice Marshall, in *Cohens* v. *Virginia,* 6 Wheat. 378, said, "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used * * * * Any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case calls for its expression." In *Bryan* v. *Bernheimer,* 181 U. S. 188, 197, the Court calls attention to a prior *dictum* and refuses to follow it because it was not on a point necessarily in the case. These are legal bromides, and we regret that what is doubtless an inadvertence makes it seem necessary even to advert to them.

It is respectfully submitted that this Court, in stating that "The contrary is well established," on the authority of *Groves* v. *Slaughter,* ascribes authority to a secondary *obiter* expression of a single judge far beyond the understanding of the bar concerning the value of secondary *dicta* in the concurring opinions of the judges.

The Citation from Story

The Court cites 2 Story on the Constitution, Sec. 1088, and quotes the same authority, Sec. 1087. Justice Story, in Vol. 2, Sec. 1069, of the same work, says:

"The laying of such imposts * * * often is used, as a mere regulation of commerce * * * * But the laying of such imposts and the duties is as certainly and more usually, a right exercised as part of the power to lay taxes * * * * * " Here, of course, lies the explanation of the statement quoted by this Court from Section 1087. The author cites *Gibbons* v. *Ogden,* 9 Wheat. 1, 201, 202. The comment on the commerce clause, found in Sections 1087 and 1088 is all based on the authority of Chief Justice Marshall in *Gibbons* v. *Ogden* and must, therefore, be construed and limited accordingly. As we have seen supra, Chief Justice Marshall was not speaking of the extent to which customs duties could be levied in order to regulate commerce *since* or *under* the Constitution but was saying that they had been so used *prior* to the adoption of that instrument.

It has never been questioned by any competent authority, certainly not by this Petitioner, that exactions, in form taxes, may be and often have been levied under the power to regulate commerce, and that and nothing more appears to be what Mr. Justice Story has reference to in the quoted portion of Section 1087. The reference to *Gibbons* v. *Ogden* emphasizes the conclusion that Story had in mind that the laying of im-

port duties pertained peculiarly to the taxing power, although exactions, called duties, might also be levied as a means to make a commerce regulation more effective. It cannot be supposed that he meant to confuse these powers and to obliterate the well established distinction between them.

We call attention to the fact that Sections 1087 and 1088, from Story, are from his general argument in favor of the system of protection to home industry, a then highly controversial question from both the legal and the economic points of view. Story's argument on this point has not been accepted *in toto* by this Court or by commentators. Story states the true and now accepted constitutional ground, on which the theory of protection is sustained, in Section 1086, when he says that Congress may "select and arrange duties" so as to "designedly protect domestic manufacturers." When Story goes farther and argues that the whole theory of protection may also be supported under the commerce clause, this court has refused to go with him, as the holding in *Hampton & Company* v. *United States*, supra, clearly shows, where it is held that Congress, under the *taxing* power, may select subjects for and so arrange the amounts of duties as to protect home in-

dustry and that the presence of this *motive* does not render a *"revenue* act" invalid. Indeed, we think that the principle on which *Hill* v. *Wallace,* 259 U. S. 44, *Child Labor Tax Case,* 259 U. S. 20, *Loan Association* v. *Topeka,* 20 Wall. 655, and other cases, were decided, supports the conclusion that an act of Congress which upon its face avowedly showed a purpose to make levies for the purpose of protection and wholly without regard to revenue, would be held to be an unconstitutional attempt to regulate the internal concerns—industry—of the States.

REGULATORY EXACTIONS AND TAXES DISTINGUISHED

In stating that Congress may levy duties under the commerce power, the opinion omits the well established distinction between the exercise of that power, in aid of the effective exercise of which duties or exactions in form taxes, are imposed, and the levying of duties or taxes where the constitutional purpose is revenue. This important distinction is clearly pointed out in 1 Willoughby on the Constitution of the United States 85-86, where pertinent quotations from the *Head Money Cases* and *Veazie Bank* v. *Fenno,* supra, are set forth. Petitioner has at all times maintained that the specific sections challenged are palpably, in purpose and intent,

revenue and not regulatory measures. Of this contention neither government counsel nor any court has so far taken notice, notwithstanding its seemingly fundamental importance.

Opinion Nullifies Certain Limitations

The conclusion that the Tariff Act of 1922 is, as *a whole*, a regulation of commerce, suggests some pertinent questions. On what principle is one clause, one statement of several expressed purposes, in the title held to fix the constitutional purpose of *every section* of the act? Is it henceforth to be the law that Congress may avoid the force of specific limitations upon its powers by the simple—not even ingenious—device of a multitudinous statement of purposes in the title in the hope that one statement may be found which may be held to give character to the whole and thus save *separable parts* against attack on the ground that they are in excess of granted powers? Is it to be the law henceforth that if a specific section of the Tariff Act be challenged as beyond the power of Congress under the commerce clause, the Government can find complete shelter behind the statement in the title that one purpose is "to provide revenue" and that, therefore, the whole act is a revenue meas-

ure? Logically, the answer must be in the affirmative.

Judicial sanction seems to be given a sort of legislative shell-pea game, with the result that a litigant who attacks a tariff act which is avowedly and clearly a revenue measure, say on the ground that it originated in the Senate, will be met with the answer that the act is "to regulate commerce," because that clause appears in the title, or because a few sections in or a motive for the act appear to concern commerce; and if he attacks specific sections, as Petitioner does here, on the ground that they are tax or revenue measures —the act having originated in the House on the supposition that it was for revenue—and cannot for that reason be applied to him, he is repulsed by the identical reply; and if the attack on such a revenue act, with such a conveniently comprehensive title, be because the duties are not uniform, he fails for the same reasons. It is respectfully suggested that certain specific constitutional limitations are swept away by the opinion.

Commerce Clause Unduly Exalted

There seems no escape from the conclusion that the

instant opinion exalts the commerce clause of the Constitution to a position of preeminence heretofore denied it by this Court. That this clause is subject to all limitations applicable to other provisions of the instrument has long since been established. See Brief for Petitioner, pp. 21-25. Beyond asserting that the implied prohibition against burdening State governmental instrumentalities has its own limitations, this Court does not discuss Petitioner's position to the effect that the prohibition applies to the customs tax challenged. See Brief for Petitioner, pp. 21-25; Petitioner's Reply Brief, pp. 13-15.

ONE ACT; SEVERAL SOURCES OF POWER

The Tariff Act of 1922 deals with an almost infinite variety of subjects in almost infinitely various ways. While the Constitution is the general source of power as to all, different sections of that instrument support different sections of the Act. This is, of course, common practice and Chief Justice Marshall in *Gibbons* v. *Ogden,* supra, points out that this often happens, and in *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, this Court points out that section one of the Sherman Anti-Trust Law finds its source in the commerce clause, whereas section three thereof

derives authority from Art. I, sec. 8, cl. 17 of the Constitution. Section 132 of the Tariff Act of 1922 (C. 356, Title III, sec. 304; 42 Stat. 936), for another illustration, is as clearly a regulation of commerce as the paragraphs here challenged are purely tax provisions.

States May Purchase Abroad

The State of Illinois may, under the Constitution and under existing acts of Congress, purchase the instrumentalities for its governmental operations in any market in the world; and the Petitioner does not suppose that this or any other tribunal would hold that the Constitution of the United States prevents the States from making such purchases. It is not until the States attempt to bring them into the country that its power can be made operative.

Nobody has contended that "The importation is a function of the State government independent of the federal power." That question is not in this case. Neither has anybody contended that "The control of importation * * * rests with the State" rather than with Congress. The power of Congress over importations is derived from the Constitution, as is every other power that body possesses, and is subject

to the limitations of that instrument; that control may be exerted under various powers, it is true; it may be exerted under the war and the treaty making power; it may be exerted directly under the specific grant of control over foreign commerce; and it may be exerted indirectly through the exercise of the power to tax. This Petitioner has never disputed, indeed through its counsel it conceded on the oral argument, that if the clauses of the Tariff Act under which the justification of the tax challenged was sought to be made, were held to be an exertion of the congressional power over commerce, the Petitioner had no standing in court. The Petitioner made and again makes this concession advisedly, and with the firm conviction that to sustain the exaction challenged as an exertion of the ordinary power over commerce is a perversion of plain English and a subversion of fundamental constitutional distinctions, breaking down the partition which separates the power over commerce from the taxing power.

Right to Import Not Created by the Constitution

While, as the opinion points out, "there is no vested right to carry on foreign commerce," and "the

control of importation * * * rests * * * with the Congress," propositions which this Petitioner has never questioned, it is equally well settled by numerous declarations of this Court that the right to engage in foreign and interstate commerce does not in any sense owe its existence to constitutional grant or "congressional enactment." 2 Willoughby on the Constitution of the United States 723. The Constitution "found it an existing right and gave to Congress the power to regulate it," says Marshall in *Gibbons* v. *Ogden,* supra, in speaking of interstate commerce. Obviously, this is true of foreign commerce as well. The States undeniably had the right to import their governmental instrumentalities before the Constitution; they surrendered to Congress the *control* over commerce intended otherwise to be free. *Gibbons* v. *Ogden,* supra. *Crutcher* v. *Kentucky,* 141 U. S. 438; *Employers' Liability Cases,* 207 U. S. 463; Reply Brief, 15-18. This Court in the *Employers' Liability Cases,* supra, repudiated an argument concerning an interpretation of the Constitution because it would destroy "that freedom of commerce which it was its purpose to preserve."

POWER TO PROHIBIT FOREIGN COMMERCE

This question is, in Petitioner's view, not in this case. Inasmuch as the leading case of *Buttfield* v. *Stranahan*, 192 U. S. 470, is cited in support of a broad claim of power under the commerce clause to exclude articles from foreign commerce, we call attention to the fact that high authority denies that this decision supports the conclusion that Congress has the power *arbitrarily* to exclude articles "irrespective of police considerations." 2 Willoughby on the Constitution of the United States, 726-27. An identical position has been consistently supported by Petitioner in this case in all courts, in response to the contrary suggestions. Petitioner's Reply Brief, 15 ff.; and see Brief for Petitioner, pp. 21-23.

LEGAL PROPOSITIONS NOT NOTICED BY THIS COURT

Respectfully we call attention to legal propositions seriously advanced by all the parties interested in this case, but which receive no attention in the opinion.

1. The fact is not considered that the Court of Customs and Patent Appeals itself defined a tariff duty as "a tax on imports." *United States* v. *Shallus*, 9 Ct. Cus. App. 168, 171. Brief for Petitioner, p. 18.

2. The Petitioner's attack is levelled at four specified paragraphs of the Tariff Act of 1922 which, upon their face, in terms, purpose and intent, are purely revenue or tax measures, and do not constitute commercial regulation. This Court seems to permit one clause, expressing a purpose to regulate commerce, in the title, to give character to the entire act.

3. If Congress can, under the guise of the power to regulate foreign commerce, levy duties on imports, it can also, under the guise of regulating foreign commerce, in fact, levy duties on exports, notwithstanding the Constitution prohibits a *tax* on exports.

4. The Petitioner has, at all times, maintained that the extent of the control which Congress may, under the Constitution as a whole, exercise over foreign commerce is not an issue in this case. Congress may and does control foreign commerce through other grants of power than the commerce clause, but there is no pretense that Congress has exercised any power to that end in the instant case, except what incidentally results from the use of the power to enact a tariff act. The specific contention is that four paragraphs of the Tariff Act of 1922 are tax measures and not regulations of commerce, a contention which the

majority of the lower court ignored, and of which this Court takes no notice. The bald fact is that the contention of the Petitioner has not been accurately stated, and therefore, has, so far, gone without pertinent judicial answer.

5. The distinction has been repeatedly pointed out that the cases cited in the first complete paragraph on page 2 of the opinion in support of the proposition that Congress has the power to exclude importations altogether, had to do, in the main, with importations of commodities in themselves inherently or potentially harmful, or were embargo cases where, under powers other than the commerce power, importations were, for the time being, suspended or stopped. That question is not in this case; and even if Congress have the power, which we do not deny, to prohibit importations in many instances, and perhaps of all kinds of commodities, in the exercise of various powers, the question is not here, because the sections challenged are not prohibitions upon importations, are not regulations of commerce, but are specific and direct tax sections.

6. The practice of the Congress, ever since the Constitution was adopted, to originate Tariff acts in

the House, in conformity with the requirement that revenue measures must originate therein, seems to be given no consideration.

7. If an ordinary tariff act, like that of 1922, is held to be a commerce regulation rather than a revenue measure, the vitally important requirement of uniformity in the levy of customs duties has been stricken from the Constitution. Brief for Petitioner, p. 20.

8. *Hampton & Company* v. *United States,* supra, is overruled.

9. The reasoning of *South Carolina* v. *United States,* supra, is silently repudiated.

10. The fundamental principle on which the opinion is grounded is supported by reference to a *dictum* and to an argument by Story in behalf of protection, which latter has been, in principle, repudiated by this Court in *Hampton & Company v. United States,* supra.

In justice to the Legal Departments of the several States which joined in this proceeding, the Petitioner desires to say that the theory on which the instant case was founded was not formulated in haste; that

the resolution to take proceedings to test the validity of the imposition challenged in the circumstances of this case was not reached until after deliberate consideration. The entire structure of the legal argument, in both the Court of Customs and Patent Appeals and in this Court, was built up after many months of careful study. We have felt that the case was important; that it was not a frivolous proceeding; and that the questions raised had not really become live issues until the adoption of the Tariff Act of 1922 (42 Stat. 858, 922), Paragraph 573, Tariff Act of 1913 (38 Stat. 161), exempted "philosophical and scientific apparatus" in language almost identical with the Tariff Act of August 10, 1790. Petitioner's Reply Brief, pp. 2-3. This is a notorious fact and explains why this constitutional question gets into the United States Supreme Court now for the first time. This Court is deciding new constitutional questions every day, although the Constitution is 145 years old. There is no presumption that a question is unimportant simply because it has never been brought into court before.

For all the reasons stated above, we think a rehear-

ing should be ordered in this case and respectfully petition this Court to that end.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 538.—October Term, 1932.

Board of Trustees of the University of Illinois, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Court of Customs and Patent Appeals.

[March 20, 1933.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The University of Illinois imported scientific apparatus for use in one of its educational departments. Customs duties were exacted at the rates prescribed by the Tariff Act of 1922, c. 356, 42 Stat. 858. The University paid under protest, insisting that as an instrumentality of the State of Illinois, and discharging a governmental function, it was entitled to import the articles duty free. At the hearing on the protest, the Customs Court decided in favor of the Government (59 Treas. Dec. 747) and the Court of Customs and Patent Appeals affirmed the decision. 61 Treas. Dec. 1334. This Court granted certiorari. 28 U. S. C., sec. 308; 287 U. S. —.

The Tariff Act of 1922 is entitled—"An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes". The Congress thus asserted that it was exercising its constitutional authority "to regulate commerce with foreign nations". Art. I, sec. 8, par. 3. The words of the Constitution "comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend". *Gibbons* v. *Ogden*, 9 Wheat. 1, 193. It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action. *Id.*, pp. 196-200; *Brown* v. *Maryland*, 12 Wheat. 419, 446; *Almy* v. *California*, 24 How. 169, 173; *Buttfield* v. *Stranahan*, 192 U. S. 470, 492, 493. The power is buttressed by

the express provision of the Constitution denying to the States authority to lay imposts or duties on imports or exports without the consent of the Congress. Art. I, sec. 10, par. 2.

The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted. No one can be said to have a vested right to carry on foreign commerce with the United States. *Buttfield* v. *Stranahan, supra; The Abby Dodge,* 223 U. S. 166, 176, 177; *Brolan* v. *United States,* 236 U. S. 216, 218, 219; *Weber* v. *Freed,* 239 U. S. 325, 329, 330. If the Congress saw fit to lay an embargo or to prohibit altogether the importation of specified articles, as the Congress may (*The Brigantine William,* 2 Hall's Amer. L. J., 255; Fed. Cas. No. 16700; *Gibbons* v. *Ogden, supra,* pp. 192, 193; *Brolan* v. *United States, supra; Weber* v. *Freed, supra; Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 434), no State by virtue of any interest of its own would be entitled to override the restriction. The principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce.

Appellant argues that the Tariff Act is a revenue measure; that it is not the less so because it is framed with a view, as its title states, of encouraging the industries of the United States (*Hampton & Company* v. *United States,* 274 U. S. 394, 411, 412); that the duty is a tax, that the Act is not one for the regulation of commerce but is an exertion of the taxing power, and that, as such, it is subject to the constitutional limitation that the Congress may not lay a tax so as to impose a direct burden upon an instrumentality of a State used in the performance of a governmental function.

It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce. *Gibbons* v. *Ogden, supra,* p. 201. It is also true that the taxing power embraces the power to lay duties. Art. I, sec. 8, par. 1. But because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate commerce. The contrary is well established. *Gibbons* v. *Ogden, supra,* p. 202. "Under the power to regulate foreign commerce Congress impose duties on importations, give drawbacks, pass embargo and non-intercourse laws, and make all other regulations necessary to navigation, to the safety of passen-

gers, and the protection of property". *Groves* v. *Slaughter,* 15 Pet. 499, 505. The laying of duties is "a common means of executing the power". 2 Story on the Constitution, sec. 1088. It has not been questioned that this power may be exerted by laying duties "to countervail the regulations and restrictions of foreign nations". *Id.,* sec. 1087. And the Congress may, and undoubtedly does, in its tariff legislation consider the conditions of foreign trade in all its aspects and effects. Its requirements are not the less regulatory because they are not prohibitory or retaliatory. They embody the congressional conception of the extent to which regulation should go. But if the Congress may thus exercise the power, and asserts, as it has asserted here, that it is exercising it, the judicial department may not attempt in its own conception of policy to distribute the duties thus fixed by allocating some of them to the exercise of the admitted power to regulate commerce and others to an independent exercise of the taxing power. The purpose to regulate foreign commerce permeates the entire congressional plan. The revenue resulting from the duties "is an incident to such an exercise of the power. It flows from, but does not create the power". *Id.*

The principle invoked by the petitioner, of the immunity of state instrumentalities from Federal taxation, has its inherent limitations. *Fox Film Corporation* v. *Doyal,* 286 U. S. 123, 128. It is a principle implied from the necessity of maintaining our dual system of government. *Collector* v. *Day,* 11 Wall. 113, 127; *Willcuts* v. *Bunn,* 282 U. S. 216, 225; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 575. Springing from that necessity it does not extend beyond it. Protecting the functions of government in its proper province, the implication ceases when the boundary of that province is reached. The fact that the State in the performance of state functions may use imported articles does not mean that the importation is a function of the state government independent of federal power. The control of importation does not rest with the State but with the Congress. In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power. There is thus no violation of the principle which petitioner invokes, for there is no encroachment on the power of the State as none exists with respect to the subject over which the Federal power has been exerted. To

permit the States and their instrumentalities to import commodities for their own use, regardless of the requirements imposed by the Congress, would undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create. It is for the Congress to decide to what extent, if at all, the States and their instrumentalities shall be relieved of the payment of duties on imported articles.

The contention of the petitioner finds no support in the history of tariff acts or in departmental practice. It is not necessary to review this practical construction. It is sufficient to say that only in recent years has any question been raised by state officials as to the authority of Congress to impose duties upon their imports.

In view of these conclusions, we find it unnecessary to consider the questions raised with respect to the particular functions of the petitioner and its right to invoke the principle for which it contends.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.